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1923.

THE

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AND ON APPEAL THEREFROM IN THE

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ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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OF THE

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OF

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1923.

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THE COURT OF APPEAL.

1923.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Ambatielos, The. The Cephalonia	68
Atkinson, Kent *v.*	142

B.

Beech, In the Estate of. Beech *v.* Public Trustee	(C. A.)	46
—— *v.* Public Trustee. In the Estate of Beech	(C. A.)	46
Blidensol, The		26
Blunt, In re.		57n

C.

Cephalonia, The. The Ambatielos		68
Champion, The and The Socrates		76
Champion, The and The Socrates	(C. A.)	162
Chancellor of London Diocese, Parochial Church Council of St. Magnus *v.*		38
Colorado, The	(C. A.)	102
Cyclops, The		80

D.

	PAGE
Dean *v.* Dean	172

E.

Emery, In re. Emery *v.* Emery		184
—— *v.* Emery. In re Emery		184
Empress, The		96

G.

Glatton (H.M.S.)		215
Graham *v.* Graham		31

H.

H.M.S. Glatton		215
Hofsfos, The		23

J.

James Westoll, The	(C. A.)	94n

K.

Kashmir, The	(C. A.)	85
Kent *v.* Atkinson		142
Koursk, The		206

M.

	PAGE
Marson *v.* Unmack	163
Mitford *v.* Mitford	130
Morgan *v.* Morgan	1

N.

Naval Operations in Mesopotamia, In re.	149

P.

Palmer *v.* Palmer (C. A.)	180
Parochial Church Council of St. Magnus *v.* Chancellor of London Diocese	38
Portreath, The	155
Public Trustee, Beech *v.* In the Estate of Beech (C. A.)	46
Pulford *v.* Pulford	18

S.

	PAGE
Smith *v.* Smith	128
—— *v.* —— (C. A.)	191
Socrates, The and The Champion	76
Socrates, The and The Champion (C. A.)	162
Sylvan Arrow, The	14, 220

T.

Theodoros, The	26

U.

Unmack, Marson *v.*	163

W.

Wilhelmina, The	112

TABLE OF CASES CITED.

A.

		PAGE
Adah, The	2 Hagg. Adm. 326	69
Alison's Trusts, In re	31 L. T. 639	133
American Surety Company *v.* Wrightson	16 Com. Cas. 37	108
André Théodore, The	10 Asp. M. L. C. 94	105
Anghinelli *v.* Anghinelli	[1918] P. 247	31, 135
Annette (The) and The Dora	[1919] P. 105	15
Armytage *v.* Armytage	[1898] P. 178	31
Atkinson *v.* Morris	[1897] P. 40	49
Atter *v.* Atkinson	L. R. 1 P. & M. 665	50
Australia, The	[1895] P. 212	208
Avon, The	[1891] P. 7	207

B.

Baker *v.* Bolton	1 Camp. 493	147
Barry's Trusts, In re	[1906] 1 Ch. 768	193
Bartholomew *v.* Henley	3 Phillim. 317	51
Bater *v.* Bater	[1906] P. 209	132
Bearn, The	[1906] P. 48	96
Bee, The	2 Dods. 498	71
Benjamin Franklin, The	6 C. Rob. 350	71
Bernstein *v.* Bernstein	[1893] P. 292	144
Blount *v.* Blount	[1916] 1 K. B. 230	192
Blunt, In re	[1923] P. 57n.	51
Brinsmead *v.* Harrison	L. R. 7 C. P. 547	208
Brisco *v.* Baillie Hamilton	[1902] P. 234	49
Broadmayne, The	[1916] P. 64	15
Brook *v.* Brook	9 H. L. C. 193	133
Bullmore *v.* Wynter	22 Ch. D. 619	146
Bullock *v.* London General Omnibus Company	[1907] 1 K. B. 264	212
Burder *v.* Veley	12 Ad. & E. 233	42
Burns, The	[1907] P. 137	114
Burroughes *v.* Abbott	[1922] 1 Ch. 86	193

C.

Cachapool, The	7 P. D. 217	82
Caliph, The	[1912] P. 213	91
Calliope, The	[1891] A. C. 11	98
Campbell *v.* Campbell	[1922] P. 187	195
Carden *v.* Carden	1 Curt. 558	36
Castlegate, The	[1893] A. C. 38	225
Chetti *v.* Chetti	[1909] P. 67	140

		PAGE
Christian *v.* Christian	78 L. T. 86	32
City of Cambridge, The	L. R. 5 P. C. 451	82
Clan Grant, The	6 Asp. M. L. C. 144	72
Clark *v.* Bowring & Co.	1908 S. C. 1168	104
—— *v.* London General Omnibus Company	[1906] 2 K. B. 648	147
Clarke *v.* Clarke	[1911] P. 186	3
Collett *v.* Collett	3 Curt. 726	33
Collins *v.* Elstone	[1893] P. 1	50
Constable *v.* Steibel	1 Hagg. Ecc. 56	59
Constantinidi *v.* Constantinidi	[1904] P. 306	1
Cooke *v.* Cooke	2 Phillim. 40	177
Cooke's Trusts, In re	56 L. J. (Ch.) 637	133
Cooper, In re	[1917] W. N. 385	196
Cope *v.* Doherty	4 K. & J. 367	124
Coventry *v.* Williams	3 Curt. 787	56
Cowell *v.* Taylor	31 Ch. D. 34	186
Cox *v.* Cox	[1906] P. 267	144
Crosfield & Sons *v.* Manchester Ship Canal Company	[1904] 2 Ch. 123	70

D.

Dalrymple *v.* Campbell	[1919] P. 7	50
—— *v.* Dalrymple	2 Hagg. Con. 54	132
Danube II., The	[1921] P. 183	115
Dasent *v.* Dasent	1 Rob. Ecc. 800	33
Dayrell-Steyning *v.* Dayrell-Steyning	[1922] P. 280	193
Delany *v.* Metropolitan Board of Works	L. R. 2 C. P. 532; 3 C. P. 111	114
Denston *v.* Ashton	L. R. 4 Q. B. 590	185
Devonshire (S.S.), The *v.* The barge Leslie	[1912] A. C. 634	208
Disperser, The	[1920] P. 228	91
Don *v.* Lippmann	5 Cl. & F. 1	108
Donegal *v.* Donegal	3 Phillim. 586	34
Dowthorpe, The	2 W. Rob. 73	69
Druid, The	1 W. Rob. 391	224
Drummond *v.* Parish	3 Curt. 522	59

E.

Edwin, The	Br. & Lush. 281	223
Englishman, The	[1895] P. 212	208

F.

F. de Maerschalck, The	Shipping Gazette, June 2, 1906	98
Farquharson *v.* Morgan	[1894] 1 Q. B. 552	44
Fielden *v.* Morley Corporation	[1900] A. C. 133	121
Firebrace *v.* Firebrace	4 P. D. 63	32
Fitzgerald *v.* Fitzgerald	L. R. 1 P. & M. 694	18
Florence, The	16 Jur. 572	156

		PAGE
Frankfort *v.* Frankfort	4 Notes of Cases, 280	192
Frankland, The	[1901] P. 161	208
Frowd *v.* Frowd	[1904] P. 177	19
Fulton *v.* Andrew	L. R. 7 H. L. 448	49

G.

Garnett-Botfield *v.* Garnett-Botfield	[1901] P. 335	49
Gatehouse *v.* Gatehouse	L. R. 1 P. & M. 331	22
Gattward *v.* Knee	[1902] P. 99	50
Glasgow Corporation *v.* Smithfield and Argentine Meat Co.	1912 S. C. 364	114
Godman *v.* Godman	[1919] P. 229; [1920] P. 261	50, 55
Goldie *v.* Murray	2 Curt. 797	186
Goldrei, Foucard & Son *v.* Sinclair	[1918] 1 K. B. 180	208
Gould *v.* Gapper	5 East, 345	42
Graham *v.* Graham	[1923] P. 31	129
Gran *v.* Gran	Times Newsp., Feb. 15, Mar. 1, 19, 1921	129
Gregson *v.* Taylor	[1917] P. 256	49
Guardhouse *v.* Blackburn	L. R. 1 P. & M. 109	50

H.

H.M. Submarine E. 14	[1920] A. C. 403	149
Harris *v.* Morris	4 Esp. 41	176
Harrison *v.* Sterry	5 Cranch, 289	106
Harter *v.* Harter	L. R. 3 P. & M. 11	50
Hay *v.* Northcote	[1900] 2 Ch. 262	132
Henrich Björn, The	11 App. Cas. 270	75
Henty *v.* Henty	33 L. T. 263	22
Herbert *v.* McQuade	[1902] 2 K. B. 631	204
Hiscock, In the Goods of	[1901] P. 78	50
Howe (Earl) *v.* Inland Revenue Commissioners	[1919] 2 K. B. 336	204
Howell *v.* Holdroyd	[1897] P. 198	166
Huldah, The	3 C. Rob. 235	114

J.

James Westoll, The	[1923] P. 94n.	89
Janes' Settlement, In re	[1918] 2 Ch. 54	196

K.

Kent *v.* Atkinson	127 L. T. 539	144
Kettlewell *v.* Kettlewell	[1898] P. 138	178
Knight Errant, The	[1910] P. 199	208

L.

La Constancia	4 N. of C. 512	71
Lambert *v.* Bassett	Ir. R. 11 Eq. 291	184

		PAGE
Lawrence *v.* Lawrence	2 Sw. & Tr. 575	22
Le Caux *v.* Eden	2 Doug. 594	122
Le Mesurier *v.* Le Mesurier	[1895] A. C. 517	33
Lemington, The	2 Asp. M. L. C. 475	220
Limerick, The	Unreported	72
London Corporation *v.* Cox	L. R. 2 H. L. 239	45
Longford, The	14 P. D. 34	114
Loraine *v.* Loraine	[1912] P. 222	3

M.

M. *v.* M.	26 Times L. R. 305	145
Macfadzen *v.* Olivant	6 East, 387	145
Mackonochie *v.* Penzance (Lord)	6 App. Cas. 424	45
Mann *v.* Mann	[1922] P. 238	182
Manning *v.* Manning	L. R. 2 P. & M. 223	32
Manor, The	[1907] P. 339	105
Martin *v.* Mackonochie	3 Q. B. D. 730; 4 Q. B. D. 697	42, 43
Mentor, The	1 C. Rob. 179	114
Merton *v.* Merton	83 L. T. 223	4
Michell *v.* Michell	[1891] P. 208	1
Milford, The	Swa. 362	108
Mills *v.* Long	Say. 136	68
Monsell *v.* Monsell	[1922] P. 34	144
Moorcock, The	14 P. D. 64	96
Moran *v.* Place	[1896] P. 214	184
Morrell *v.* Morrell	7 P. D. 68	50
Morris *v.* Robinson	3 B. & C. 196	208
Morse *v.* Morse	2 Hagg. Ecc. 608	34
Morteo *v.* Julian	4 C. P. D. 216	74
Moss *v.* Moss	[1897] P. 263	133
Mouncey *v.* Robinson	37 L. J. (Eccl.) 8	165
Moysey *v.* Hillcoat	2 Hagg. Eccl. 30	166

N.

Nelson, The	6 C. Rob. 227	71
Neptune, The	1 Hagg. Adm. 227	157
Newell *v.* Starkie	89 L. J. (P. C.) 1	116
Niboyet *v.* Niboyet	4 P. D. 1	33, 135
Norris *v.* Norris	1 Sw. & Tr. 174	7

O.

Ogden *v.* Ogden	[1908] P. 46	132
Osborn *v.* Gillett	L. R. 8 Ex. 88	147
Oscar II., The	[1920] A. C. 748	114
Otway *v.* Otway	2 Phillim. 109	177

P.

Parlement Belge, The	5 P. D. 197	220
Parton *v.* Williams	3 B. & Al. 330	115

		PAGE
Peck's Settlement, In re	[1921] 2 Ch. 237	195
Pemberton *v.* Hughes	[1899] 1 Ch. 781	132
——— *v.* Pemberton	2 Notes of Cases, 17	192
Petone, The	[1917] P. 198	15
Pomfret's (Lord) Case	Not reported	177
Pooley's Trustee *v.* Whetham	28 Ch. D. 38	186
Prince George, The	3 Hagg Adm. 376	68

R.

Ramsden *v.* Ramsden	2 Times L. R. 867	145
Reg. *v.* Judge of City of London Court	25 Q. B. D. 339	72
Rex *v.* Port of London Authority	[1919] 1 K. B. 176	114
—— *v.* Tristram	[1902] 1 K. B. 816	42
Rhodes *v.* Dawson	16 Q. B. D. 548	185
Riera *v.* Riera	31 Times L. R. 50	33
Ripon City, The	[1897] P. 226	222
Roberts *v.* Brennan	[1902] P. 143	33, 132
——— *v.* Metropolitan Borough of Battersea	110 L. T. 566	114
Robinson, In re	27 Ch. D. 160	197
Robson *v.* Robson	3 Sw. & Tr. 568	185
Ross *v.* Walker	2 Wils. 264	68
Ruby (No. 2), The	[1898] P. 59	72
Rush, In re	[1922] W. N. 267; [1923] 1 Ch. 56	4

S.

Sadler *v.* Great Western Railway Company	[1896] A. C. 450	208
Scott *v.* Sebright	12 P. D. 21	133
Scrimshire *v.* Scrimshire	2 Hagg. Con. 395	132
Servia (The) and The Carinthia	[1898] P. 36	69, 82
Shaw, In re	[1918] P. 47	192
Simonin *v.* Mallac	2 Sw. & Tr. 67	132
Simpson *v.* Fogo	1 H. & M. 195	104
Sinclair *v.* Sinclair	1 Hagg. Con. 294	132
Smart *v.* Wolff	3 T. R. 323	122
Smyth, Ex parte	3 Ad. & E. 719	42
Sottomayor *v.* De Barros	2 P. D. 81; 3 P. D. 1	33, 133
Stocker *v.* Stocker	[1917] P. 264	145
Sulman Pak, The	[1922] P. 73	154
Susanna, The	6 C. Rob. 48	120
Swain *v.* Follows	18 Q. B. D. 585	186
Sykes *v.* Sykes	[1897] P. 306	178

T.

Tagus, The	[1903] P. 44	104
Tasmania, The	13 P. D. 110	223
Tervaete, The	[1922] P. 259	14, 109, 223
Thomas Joliffe, The	[1891] P. 7	207
Thompson *v.* London County Council	[1899] 1 Q. B. 840	208
Thusfield *v.* Jones	Skin. 27	42

		PAGE
Ticonderoga, The	Swa. 215	223
Tourle *v.* Tourle	1 Sw. & Tr. 176; 27 L. J. (P.) 73n.	7
Tress *v.* Tress	12 P. D. 128	182
Turner *v.* Thompson	13 P. D. 37	133
Two Ellens, The	L. R. 4 P. C. 161	108
Twomey, In the Goods of	[1900] 2 I. R. 560	185

U.

Union, The	Lush. 128	105
Utopia, The	[1893] A. C. 492	223

W.

W. H. No. 1, The	[1910] P. 199	208
Warrender *v.* Warrender	2 Cl. & F. 488	132
Warrior, The	Lush. 476	156
Watkins *v.* Watkins	[1896] P. 222	197
Westrup *v.* Great Yarmouth Steam Carrying Company	43 Ch. D. 241	69
Whitcomb *v.* Whitcomb	2 Curt. 351	33
Whyte *v.* Pollok	7 App. Cas. 400	50
Williams *v.* Williams	[1921] P. 131	182
Wilson *v.* Glossop	20 Q. B. D. 354	177
Wilton *v.* Webster	7 C. & P. 198	145
Wood *v.* Gossage	[1921] P. 194	59
—— *v.* Wood	[1891] P. 272	178

Y.

Yelverton *v.* Yelverton	1 Sw. & Tr. 574	32

Z.

Zamora, The	[1916] 2 A. C. 77	115
Zoe, The	11 P. D. 72	91
Zollverein, The	Swa. 96	124

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

DIVORCE.

1922
Oct. 16, 17, 19, 23.

MORGAN *v.* MORGAN AND KIRBY.

Divorce—Decree Absolute—Petition to vary Settlement—Respondent and Co-respondent married before Petition presented—Restraint on Anticipation—Power of Court to remove—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

The power of the Court to vary settlements under the Matrimonial Causes Act, 1859, includes a power to override a restraint on anticipation contained in a delinquent wife's settlement, even in a case where the wife has married the co-respondent after the decree absolute and before the order to vary.

Dicta in *Constantinidi* v. *Constantinidi* [1904] P. 306, 308 and *Michell* v. *Michell* [1891] P. 208, 210 discussed and not followed.

In this case the parties were married on April 4, 1898. On October 25, 1920, a decree nisi was pronounced on the husband's petition for divorce on the ground of his wife's adultery. The decree was made absolute on May 2, 1921, and on May 10 the wife married the co-respondent. There were two children of the marriage, a girl aged nineteen and a boy aged thirteen.

1922

MORGAN v. MORGAN AND KIRBY.

Settlements had been made on the marriage by both parties. The wife settled real estate in trust for herself for life for her separate use without power of anticipation, with remainder in trust for the husband for life, with remainder for the sons and daughters in strict settlement, with the usual powers of raising portions for the younger children, with remainder to the wife in fee, with power for the wife, if she survived the husband and married again, to appoint a life interest to a future husband, and portions to the children of any future marriage.

A considerable amount of personal estate was assigned to the trustees to be held upon the same trusts as if it were capital money arising from the settled estates.

The husband settled a sum of 10,000*l.* stocks, and a portion of 10,000*l.* to which he was entitled on his father's death, upon trust for himself for life, then to his wife for life for her separate use without power of anticipation, and then upon the usual trusts in favour of the children of the marriage, with an ultimate trust for himself.

On December 19, 1921, the husband presented a petition under the Matrimonial Causes Act, 1859, to vary the settlements. Leave to file the petition out of time had been given by the registrar only, but there was no appeal to the judge. The wife opposed this petition.

The registrar's report stated that the net yearly income of the wife under her settlement was 258*0l.*, and that of the husband under his settlement, 709*l.*; but that he had an income of 70*l.* from unsettled investments, and a voluntary allowance from his brother of 2000*l.* a year.

The report, after the usual clauses depriving the wife of all powers and interest under her husband's settlement, and limiting the powers of appointing to a future husband and children under her own settlement to the husband and children of a marriage contracted after her husband's death, suggested that the trustees of the wife's settlement should be directed to pay out of her settled income during the joint lives of the petitioner and herself 200*l.* a year to the husband for his own use and 250*l.* for the

maintenance and education of the daughter until she attained twenty-one or married, and also 250*l.* for the maintenance and education of the son until he attained twenty-one, and afterwards to pay the said sums direct to the daughter and son.

The case now came on upon the husband's motion to confirm the registrar's report.

Bayford K.C. and *Cotes-Preedy* for the motion.

W. A. Greene K.C. and *Noel Middleton* for the wife, first took the objection that the motion was out of time, because the registrar had no power to extend the time.

[DUKE P. said that as there had been no appeal the parties must be taken to have consented to the order, and it must be treated as made by himself.]

They then proceeded: The petition to vary the settlement was not presented till after the respondent had married again. On her second marriage the restraint on anticipation, which had ceased to operate when the decree absolute was made, immediately revived. The Court has no power to remove a restraint on anticipation except in cases where it is expressly given by legislation, as in cases under the Conveyancing Act. That is clear from *Constantinidi* v. *Constantinidi* (1), where the Court of Appeal held that the Court could not remove the restraint unless the petition to vary presented before the second marriage remained on the file and acted as a lis pendens. *Loraine* v. *Loraine and Murphy* (2) and *Clarke* v. *Clarke and Lindsay* (3) are instances of the same rule.

Michell v. *Michell* (4) was under a different Act of Parliament. But Lindley L.J. after saying that the power to override a restraint on anticipation is given by the Act of 1859, adds: "But observe that that enlarged power is only given where the wife ceases to be a wife, namely, after a final decree of nullity of marriage or dissolution of marriage, and where, therefore, according to the ordinary doctrines of

(1) [1904] P. 306.
(2) [1912] P. 222.
(3) [1911] P. 186.
(4) [1891] P. 208, 210.

1922

MORGAN v. MORGAN AND KIRBY.

the Court of Chancery, she would be free from the restraint against anticipating her income." That shows that where the wife has renewed the restraint by marrying again, the power given by the Act ceases.

In re Rush, Warre v. *Rush* (1) is a strong instance of the same principle. That was a question whether the charge given by the Treaty of Peace Order, 1919, upon the property of Germans in this country could be enforced against the interest of a married woman subject to a restraint on anticipation. The Court of Appeal held, reversing the decision of Russell J., that the charge could not override the restraint, because the Order contained no special words for that purpose.

Bayford K.C. in reply. The cases cited are not directly in point. In *Constantinidi* v. *Constantinidi* (2), all that was decided was that the petition might remain on the file. *Clarke* v. *Clarke and Lindsay* (3) only decided that the Court has no jurisdiction even to order an inquiry before the decree absolute. *Loraine* v. *Loraine and Murphy* (4) was not a question under this Act, but as to the power of making a settlement of the wife's property given by the Act of 1857; and Lindley L.J.'s remarks in *Michell* v. *Michell* (5) show that under this Act the Court has power to deal with the restraint. In *Merton* v. *Merton* (6), Barnes J., in exactly the same circumstances as exist in this case, made an order.

Oct. 19. THE PRESIDENT (SIR HENRY DUKE). The immediate question in this case, that of the proper contribution out of the income of the divorced wife towards the support of the husband and the children of the marriage, is a serious question where the parties are persons of social standing and considerable means, as they are in this case, and it is necessarily difficult. But the discussion has been prefaced by the raising of another question, which is of far wider importance. It affects the jurisdiction and the

(1) [1922] W. N. 267; [1923] 1 Ch. 56.
(2) [1904] P. 306.
(3) [1911] P. 186.
(4) [1912] P. 222.
(5) [1891] P. 208, 210.
(6) (1900) 83 L. T. 223.

practice of the Court in a large proportion of those cases in which the Court is asked to exercise its power, upon a marriage being dissolved by this Court, to vary the settlements made upon the marriage. That is a jurisdiction which from the nature of the circumstances is frequently resorted to, and it has to be exercised with the closest possible care.

The circumstances of the case are peculiar. [His Lordship then stated the facts and dates given above, and continued :] The objection is that s. 5 of the Act of 1859 does not confer upon the Court the power to vary marriage settlements in cases where the property is settled upon the delinquent wife, except while the delinquent wife, after the decree of dissolution of marriage, remains discovert. That is the broad proposition, and the effect, if the proposition is sustained, is that the period during which the Court in this case could have exercised the power conferred by this section was the period between May 2, 1921, when the decree absolute was pronounced here, and May 10. The proposition involves this conclusion—and Mr. Greene did not shrink from it—that if, instead of waiting to remarry until a few days after the decree absolute, the lady and her present husband had thought fit to marry in the hour after the point of time at which the decree absolute had been pronounced, the power of the Court to vary settlements under the statutes, unless it had been extended in a manner in which Mr. Greene suggested it could be extended, would be limited to the short period of time between the decree absolute pronounced here and the solemnisation of a marriage which could lawfully take place the moment afterwards. That is a startling proposition, but Mr. Greene softened its crudity by founding himself upon three decisions of the Court of Appeal, from which it followed, as he said, that in anticipation of a decree absolute in cases such as the present, the petitioner in the suit might, by way of protection or quia timet, file his petition for variation of settlements and, having filed this petition, might take steps to render that pending process effective, so that it gained the effect which is given

1922

MORGAN v. MORGAN AND KIRBY.

The President.

to a lis pendens. That was by way of extenuating the serious effect which would follow from Mr. Greene's main proposition, and his original argument was devoted chiefly to demonstrating to me that it had been the plain view of the Court of Appeal that a petition under s. 5 of the Act of 1859 might be filed, and might be effectively filed, previous to the date of the dissolution. I considered the cases which were referred to, not with any prejudice against them. One of the duties which devolves upon me is, so far as I may, to see to the regular administration of the business of this Court, and to see that due effect is given to the various rights which the law from old time, or the Legislature in more modern times, has conferred upon parties, and which are to be enforced here, and it is no part of my business to be astute to examine methods of procedure and ascertain what their precise foundations are if they are well established and have provided for the due administration of justice. I am only too glad, as I conceive I am bound to do, to give effect to all those methods of administration of justice, but I do conceive it is part of my duty to see that no difficulty is put in the way of the proceedings connected with the administration of justice in this Court, which, on the face of it, would seem to work injustice and to defeat any proper operation of law or any clear intention of the Legislature. I have tried to consider this question, during the day or two it has been pending, on that footing.

The whole of the considerations which govern the decision in this case, although they may have been assumed, have not been stated. There are two Acts of Parliament, which have been contrasted in the decisions, which deal with the control the Legislature has given to the Court over the property of the delinquent wife to a marriage. There is a section of the Matrimonial Causes Act of 1857, and a section of the Matrimonial Causes Act of 1859. The course of the legislation here is not immaterial, I think, having regard to the classes of questions that have arisen, and which the Courts have had to deal with. By s. 45 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the Court

was given power, "if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion . . . . to order such settlement as it shall think reasonable . . . . for the benefit of the innocent party, and of the children of the marriage." Early in the administration of this Divorce Act of 1857 the effect of this section came to be considered by the Court, and it was considered with great advantage in point of authority by a full Court, consisting of, besides Sir Cresswell Cresswell, Lord Campbell, and Pollock C.B. In two cases, *Norris* v. *Norris and Gyles* (1) and *Tourle* v. *Tourle and Renshaw* (2), consideration was given by the full Court to the effect of that section in the statute of 1857, and the Court in both those cases, after consideration, arrived at the clear conclusion that the section in the Act of 1857 did not empower the Court to vary marriage settlements, or, in particular, to deal with a restraint upon anticipation. This is to be observed with regard to that statute and those decisions: the Act of 1857 provided for divorce by a simple process; the decree absolute was made at the hearing of the cause, and part of the necessary preparation for dealing with the case of exercising the power provided under s. 45 of the Act of 1857 was such notice as justice required to the alleged delinquent party of the application for determination by the Court at that one hearing of the question whether the settlements should be varied. This could be at that one hearing or an adjournment of that one hearing. It was not until the Matrimonial Causes Act of 1860 that the decree nisi was introduced, and it was introduced by s. 7 of that Act, which provided that a decree of divorce should be, in the first instance, a decree nisi. The two decisions of the full Court, to which I have referred, were in the year 1858 and in the year 1859, while the procedure for divorce, so far as decree absolute was concerned, remained that which was established by the Act of 1857, and the Legislature took account of these decisions, and appears to have been minded

(1) (1858) 1 Sw. & Tr. 174.
(2) (1858) 1 Sw. & Tr. 176, but on this point 27 L. J. (P.) 73n. only.

1922

MORGAN v. MORGAN AND KIRBY.

The President.

to remedy a defect in the control which it was desirable to give to the Court over the fortune of a married woman found guilty of adultery; and s. 5 of the Act of 1859 in the most general terms empowered the Court to deal with the settled property. It provided: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

Now, antecedent to proceedings for dealing with property of a married woman under the Act of 1857, there would have been notice pending the suit before the one decree; and down to a period in the present century there was an existing practice of proceeding in the suit, and in anticipation of the decree absolute, to ascertain what upon the decree absolute might be done by virtue of the provisions of s. 5 of the Act of 1859. It became a matter for Order in chambers that inquiries should be made, and inquiries were made. There are several cases which throw light upon the matter, but in the case of *Constantinidi* v. *Constantinidi* (1), the petition having been filed pending the suit, and the Court having made an order for inquiry pending the suit, the order for inquiry pending the suit was assailed in the Court of Appeal. The Court took account of the fact that the jurisdiction was conditional upon the existence of a decree of dissolution of marriage, and, upon an appeal which was limited to the proposed inquiry during the suit, it held that such inquiry ought not to take place during the suit, but that it must take place after the final decree. In the discussion of that case, the settlement being of such a nature that the petitioner, the aggrieved husband, had grave doubt whether the powers of the Court, under s. 5, might not by reason of the nature of the settlements be greatly diminished by an early

(1) [1904] P. 306.

remarriage of the delinquent wife, he called the attention of the Court to that matter. Reference was then made to a passage in a judgment of Lindley L.J. in the Court of Appeal in *Michell* v. *Michell* (1) upon another matter which gave some colour to the apprehension that the power of the Court might be lost if it could not be exercised while the woman was still feme sole, and thereupon in the course of the discussion remarks were interchanged between counsel at the Bar and one, or perhaps more, of the Lords Justices who were sitting, upon which Mr. Greene mainly relied in this case. Mr. Lawson Walton, as he then was, called attention to the judgment of Lindley L.J., and made this forensic proposition in the course of his advocacy (2): "The Court will have no jurisdiction if the respondent marries again," and thereupon one of the Lords Justices said: "There cannot be a second marriage until the decree has been made absolute; and the petition to vary will be a lis pendens before the second marriage can be celebrated."

That observation of the learned Lord Justice was a limited acquiescence in the proposition of the learned counsel. It was followed up by a suggestion, the competency of the petition not being challenged in that Court, that the petition so unchallenged might remain on the file, and the view that the Lords Justices suggested, no doubt by way of satisfaction of the apprehension which was expressed by counsel at the Bar, was that a petition to vary settlements still on the file at the time of the decree for divorce and at the time of any subsequent proceeding of the wife as a woman who was discovert would be operative as lis pendens. Mr. Greene himself, as I gathered from his answers to one or two questions of mine, would have great doubt, if that suggestion had not arisen in the Court of Appeal and been received in that way, whether a petition claiming the exercise of a right which did not exist at the time when the petition was filed could create lis pendens, and unless the Court of Appeal has said that it could, I confess that I myself should have had very great doubt whether such a petition could create lis

(1) [1891] P. 208, 210. (2) [1904] P. 309.

1922

MORGAN v. MORGAN AND KIRBY.

The President.

pendens, whether the lis was capable of registration and whether it would have had any real effect as between parties without notice, or as against a purchaser who had notice only of an invalid proceeding. But this case has occurred to me; it is not at all an uncommon thing that parties to marriages, whose marriages are in process of being dissolved, take a holiday on the Continent or are found out of the jurisdiction at material times. The decree nisi is made, very often, in the absence of the party. For myself, I have considered what would be the effect assuming a decree nisi in an undefended suit, the respondent in the suit out of the jurisdiction, and an application for leave to file a petition for variation of settlement, or a petition filed in the absence of the respondent. How is it ever to be served? If an application is made to the Court for special means of service of such a petition, the Court must inquire whether it is a competent petition and if effect is to be given to the actual decisions in the cases to which Mr. Greene referred: *Constantinidi* v. *Constantinidi* (1); *Clarke* v. *Clarke and Lindsay* (2) and *Loraine* v. *Loraine and Murphy* (3), it seems to me that this Court could not provide means for effective service of an inefficacious petition. I have the greatest doubt—if it had not been for the argument which has been addressed to me and for the mode in which the suggestion of lis pendens was received in the Court of Appeal in the cases to which reference has been made, I should have expressed myself otherwise—but in deference to that argument and to the observations which were there exchanged, I will only say I have the greatest doubt whether at a time when the Court can exercise no jurisdiction to vary settlements, a petition to vary settlements made in anticipation of an event which may never occur can be a good petition. That deals only with the question of whether there can be an effective lis pendens which at the proper time can be duly registered so as to protect the litigant against claims arising without notice on the part of purchasers. The real question here is between

(1) [1904] P. 306. (2) [1911] P. 186.
(3) [1912] P. 222.

the petitioner and the respondent. The respondent knows, of course, all about this matter. The respondent is a party affected with notice of the nature of the claim which can be made upon her, and she knows what the law is as to that claim, and so considerations dependent upon notice either on principles of law or on doctrines of equity with regard to these matters do not arise, and it becomes a bare question of what is the power the Legislature has given to this Court.

In the first instance, Mr. Greene depended upon the discussion in the three cases to which I have referred, but later he called my attention to the judgment of Lindley L.J. in the case of *Michell* v. *Michell.* (1) In the discussion in that case, not upon the question involved in this case but upon the question of the powers of the Court with respect to following up the decree of restitution of conjugal rights by an order upon the property of the wife, Lindley L.J. considered incidentally the effect of the Act of 1857 under which the application was made, and the Act of 1859, which subsequently extended the powers of the Court. The Lord Justice did say: "that enlarged power is only given where the wife ceases to be a wife, namely, after a final decree of nullity of marriage or dissolution of marriage, and where, therefore, according to the ordinary doctrines of the Court of Chancery, she would be free from the restraint against anticipating her income." Now, if the learned Lord Justice was contemplating the case of a wife who was divorced by final decree and as to whom there was nothing more to be said, that passage throws no light upon this case at all; but if what was then said by the Lord Justice had been directed to the case of a married woman who had been divorced and had remarried, it would be in point in support of Mr. Greene's argument. In my judgment the Lord Justice had not in his mind the question which Mr. Greene raises here. The question did not arise. It had never been argued. I, myself, cannot give such a construction as is sought to be given to a passage which is confessedly obiter in a judgment

(1) [1891] P. 208, 210.

1922

MORGAN v. MORGAN AND KIRBY

The President.

irrelevant to the question which arises here. To do so would be, as I think, to thwart and obstruct the procedure of the Court in one of the most important parts of its remedial jurisdiction. Before I could do that, I must see what the Legislature has provided.

Mr. Greene, besides referring to *Michell* v. *Michell* (1), has argued to me that the Court has never assumed power to set aside the restraint upon anticipation in case of property settled upon a married woman unless it has been clearly invested by the Legislature with the duty so to do, and he referred to a recent case reported as yet only in the Weekly Notes of *In re Rush, Warre* v. *Rush.* (2) He said it was there argued, and the Court accepted the argument, that power to interfere with restraint upon anticipation is not assumed by the Courts unless the Legislature has clearly conferred it. It was said that in all the statutes cited and relied upon there was a clearly expressed power. The conspicuous feature of the statute here relied upon is that—and it has been recognized beyond doubt for nearly three-quarters of a century—it warrants the variation of settlements where there is restraint upon anticipation, although the statute does not contain express terms. The statute was in my judgment aimed at that very matter. I have referred to some reasons why I so think. The statute has been understood ever since as conferring the power to vary settlements where there is restraint upon anticipation, and the decision in *In re Rush* (2) does not help me. I have to look at the reason of the case. What I find is that the Legislature conferred this power in the amplest way, and I find also that the statute, as it seems to me, cannot have the beneficial and remedial operations it is designed to have if this artificial and arbitrary fetter is invented and imposed upon it. I do not believe there is any principle of law or doctrine of equity which warrants me in imposing such a fetter. I am satisfied that there is no decision of any Court which requires me to impose such a fetter, and I have the very great satisfaction of finding that in the one instance where this matter has been discussed,

(1) [1891] P. 208. (2) [1922] W. N. 267; [1923] 1 Ch. 56.

in the case of *Merton* v. *Merton* (1), which came before my predecessor, Lord Gorell, as long ago as the year 1900, Lord Gorell took the view, quite clearly, after reference had been made to the case of *Michell* v. *Michell* (2) and to the general principles affecting the matter, that in a case where a married woman, after her divorce, had been remarried, the Court, notwithstanding the remarriage, might deal with the settled property in which she was interested under a settlement containing restraint upon anticipation, and might deal with that property after the remarriage as it might have dealt with it during the temporary discoverture.

What I have said here applies in no way to any case in which interests have been acquired by the act of a divorced woman during discoverture in property as to which she would be by a settlement restrained from anticipation during her marriage but as to which during her discoverture she had temporary freedom. As I have said, and as is clear from the nature of the case, the considerations which I have applied in dealing with this matter, deal only with the case of the interest of the divorced woman after the second marriage. Because I think full effect cannot be given to the intention of the Legislature, as expressed in the statute of 1859, if I allow the objection made on behalf of the respondent by Mr. Greene, I disallow that objection.

On the question of amount the motion was adjourned till October 23 to permit of an agreement, and on that day, the parties not having come to an agreement, the President confirmed the registrar's report.

Solicitors for petitioner : *Rider, Heaton, Meredith & Mills.*

Solicitors for respondent : *Peacock & Goddard, for L. G. Williams & Prichard, Cardiff.*

(1) 83 L. T. 223. (2) [1891] P. 208.

J. R. B.

1922
Oct. 23.

ADMIRALTY.

THE SYLVAN ARROW.

Shipping—Practice—Collision—Maritime Lien—Action in Rem—Motion to set aside Writ—Facts in Dispute—Jurisdiction.

In an action in rem for damage by collision the defendants moved to set aside the writ and all subsequent proceedings on the ground that their vessel at the time of the collision was under requisition to, and in the sole control and possession of, the United States Navy Department, and that accordingly no maritime lien attached to her. The plaintiffs did not admit the facts set out in the defendants' affidavit in support of the motion:—

Held, that, the facts being in dispute, the Court could not try the issue on motion by affidavit and that the motion must be dismissed, but without prejudice to the right of the defendants to apply, when the issues were defined by pleadings, for the question of law to be tried as a preliminary point.

Motion to set aside a writ in rem and all subsequent proceedings in an action of damage by collision. The plaintiffs were the owners of the steamship *W. I. Radcliffe*; the defendants were the owners of the steamship *Sylvan Arrow*, the Standard Transport Co., Inc., of New York. The collision took place on December 1, 1918, in New York Harbour. According to an affidavit filed on behalf of the defendants in support of the motion, in December, 1917, the *Sylvan Arrow* while under construction was requisitioned by the United States Government and in July, 1918, upon completion was taken over by that Government and handed over to the Navy Department. From that time until her return to her owners in January, 1919, she was continuously in the service of the Navy Department who, it was alleged, had exclusive control and appointed and paid the master, officers and crew. Accordingly, the defendants alleged that no maritime lien ever attached to the *Sylvan Arrow* in respect of the damage and that she could not be arrested in an action in rem when retransferred to her owners.

Raeburn K.C. and *Dumas* for the defendants in support of the motion. On the authority of *The Tervaete* (1) no

(1) [1922] P. 259.

maritime lien attaches to the *Sylvan Arrow* in the hands of the present defendants.

[HILL J. Are the facts agreed ?]

Dunlop K.C. (*Balloch* with him) for the plaintiffs. No. The allegations of fact relied on by the defendants can only be proved at the trial. The plaintiffs do not make any admissions such as were made in *The Tervaete* (1), where the facts were not in dispute. Without consent the present motion is premature. The plaintiffs are entitled to see what issues are raised by the defendants in the defence. Even if the facts be as alleged it does not follow that the defendants would not be liable, as in the case of a chartered vessel.

Raeburn K.C. The Court has jurisdiction to set aside a writ on motion: *The Broadmayne* (2); *The Petone* (3); see also *The Annette and The Dora.* (4) Great inconvenience will be involved if the question has to be left over for determination at the trial. At the time of the vessel's arrest there was no one on board who had any knowledge of the collision and there will be great difficulty in obtaining witnesses. If, however, the matter cannot be decided on motion the question of the lien and the right to arrest ought to be tried as a preliminary issue before the trial of the action.

HILL J. This is a motion by the owners of the *Sylvan Arrow* to set aside the writ and all subsequent proceedings. The writ, issued by the owners of the steamship *W. I. Radcliffe*, is in rem. It was served on board the *Sylvan Arrow* in this country. It claims damages in respect of a collision which happened in New York Harbour on December 1, 1918. An appearance under protest was entered on behalf of the defendants. The grounds of the motion are that the writ and arrest ought to be set aside because, it is alleged, the Court has no jurisdiction in that at the time of the collision no maritime lien attached for the reasons set out in the motion—namely, that at the time of the collision the ship was under requisition and solely under the management and control

(1) [1922] P. 259.
(2) [1916] P. 64.
(3) [1917] P. 198.
(4) [1919] P. 105.

1922

THE SYLVAN ARROW.

HILL J.

of the United States Government. Mr. Dunlop, for the plaintiffs, contends that he is entitled to have a Defence delivered in order to ascertain whether it is pleaded that the persons whose negligence is complained of were the servants not of the owners—a private corporation—but of the Government of the United States. He further says that he is entitled to know what facts are pleaded, and at the present stage does not admit that the negligent persons were not the servants of the present defendants nor that they were the servants of the United States Government. Even if they were, he says, it will be contended that the defendants are liable as in the case of the owners of a chartered ship.

The facts being in issue, and there being no agreement that the points of law should be tried by affidavit upon motion, in my view the defendants are not in a position to set aside the writ. This Court no doubt has jurisdiction under the common law in respect of every cause of action which is supported by a maritime lien, but the Court also has jurisdiction under the Admiralty Court Acts. The Act of 1840 gave it jurisdiction in case of damage received by a ship, and the Act of 1861 gave jurisdiction in the case of damage done by a ship. Sect. 35 of the Act of 1861 provides that jurisdiction may be exercised either in rem or in personam. This is a claim for damage received by a ship and in respect of damage done by a ship. It may well be that the action is not sustainable, because when the facts are investigated it may turn out that there was no person on board for whom the owners are responsible, in which case there would be no right to proceed against the ship. That is a question which must depend upon the facts, and until the facts are determined, I cannot say whether there is a good cause of action or not. While the matter is in doubt it is certain that the Court has jurisdiction to try the question. Mr. Raeburn suggests that at this stage I ought to order that the question as to whose servants the negligent persons were be tried as a mixed question of fact and law. Also, I suppose, if Mr. Dunlop wants to raise it, I ought to direct to be tried, as a preliminary question of law, the point whether,

if the negligent persons were the servants of the United States Government, nevertheless the owners of the ship are liable for their negligence.

It may well be that when these matters appear as definite issues upon the pleadings it will be convenient to order that they be tried as a preliminary question, and nothing in this present judgment must be taken as an expression of opinion on my part to the contrary. But although it may be convenient to try certain issues as preliminary questions it does not follow that the Court has jurisdiction to set aside the proceedings. It is contended that I ought to deal with this matter on motion, and cases have been referred to in which the question of jurisdiction has been tried upon motion. It has been done in one set of cases with which we have become familiar of late years, where a Government has claimed immunity from the jurisdiction of the Court. That point does not arise here, whatever the facts may be as to the control of the ship at the time in question. The immunity from the jurisdiction of the Court on that ground can only be claimed by a sovereign Government and not by a private owner. In the present case the United States Government is not making any claim, and obviously national rights are not affected by the exercise of the jurisdiction. There is another class of case in which the point arises as merely one of law; e.g., where the only question is whether the claim as alleged in the writ comes within the jurisdiction of the Court or within any of the sections of the Admiralty Court Acts. Such a question clearly can be properly tried on motion. There is another set of cases, of which *The Petone* (1) is an illustration, where the matter was tried upon affidavit, but, the facts being undisputed, the only question in controversy was a question of law. It is not stated in the reports that the case was tried on motion by consent, but I think it must have been so tried, since no objection appears to have been raised to the trial on motion. But the present case starts with and mainly depends on a question of fact which is in dispute—namely, whose servants were the people who were in charge

(1) [1917] P. 198.

1922

THE SYLVAN ARROW.

of the ship? I do not think I have any power to try that issue upon affidavit on a motion to set aside the writ, and I must therefore dismiss this motion with costs.

Solicitors for the plaintiff: *Thomas Cooper & Co.*
Solicitors for the defendants: *Parker, Garrett & Co.*

E. C. M. T.

1922
Oct. 13;
Nov. 1.

DIVORCE.

PULFORD *v.* PULFORD.

Divorce—Practice—Desertion—Definition—No existing Cohabitation—Conduct of Party charged—Intention to desert—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

The statement of Lord Penzance that "Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists" (L. R. 1 P. & M. 697), is not an exhaustive definition of desertion. The conduct of the party charged must be looked at. If he or she has not recognized the duty of cohabitation in the married state, desertion has arisen. There may be a complete renunciation of that conjugal duty and an intention to put an end to cohabitation, though there is no matrimonial home, and cohabitation as an existing state of things has been suspended by circumstances not under the control of the party.

The fact that a summons under the Summary Jurisdiction (Married Women) Act, 1895, does not give the date of the commencement of the desertion is not a material objection to the order.

Fitzgerald v. *Fitzgerald* (1869) L. R. 1 P. & M. 694 discussed.

APPEAL from justices.

The parties were married in March, 1883, and lived together in Suffolk until January, 1884, when the wife was removed to a Poor Law Asylum as a person of unsound mind. She was not finally discharged until 1902. The parties had never cohabited afterwards. In 1892 the husband removed to London and bought a business from another man and carried it on in his name, as he said, to preserve the goodwill. He also commenced and continued an adulterous intercourse with another woman. He knew where his wife was after her discharge and occasionally sent her remittances of money until 1905, when not having received an acknowledgment

1922

PULFORD v. PULFORD.

of the last remittance, he, without further inquiry, assumed she was dead.

In 1922 the wife took out a summons against her husband under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, for neglecting to provide her with reasonable maintenance and so causing her to live apart from him. This summons was served on him in July, and finally dealt with on August 3, when no order was made. On this occasion the husband failed to recognize his wife, and the wife could not swear that he was her husband until he had walked across the Court, when she recognized his gait, as he was lame. On August 17, 1922, on a fresh summons charging him with desertion, but not giving any date for the commencement of the desertion, the justices found him guilty of desertion from August 3, the date of the former hearing.

The husband appealed.

J. P. Eddy for the appellant. The summons is bad in law, because it does not state the date of the desertion.

No desertion is proved, because after the wife was taken to the asylum there was not any existing state of cohabitation to be determined; and such a determination is of the essence of desertion, as laid down by Lord Penzance in *Fitzgerald* v. *Fitzgerald*. (1)

Frowd v. *Frowd* (2) shows that the same rule applies to cases under the Summary Jurisdiction (Married Women) Act, 1895.

G. C. Tyndale for the respondent. Cohabitation in the legal sense continued in spite of the detention of the wife in an asylum. On discharge therefrom the right of the wife, which had been suspended, revived. The decision of the justices was therefore right.

Cur. adv. vult.

Nov. 1. THE PRESIDENT (SIR HENRY DUKE). In this case there were two summonses dealt with by the Court of summary jurisdiction. The first, for neglecting to maintain, was heard on July 20 and August 3, 1922, and no order was

(1) L. R. 1 P. & M. 694, 697. (2) [1904] P. 177.

1922

PULFORD v. PULFORD.

The President.

made against the husband. The wife then took out a second summons for desertion, which was heard on August 17, 1922, when an order was made. The justices apparently took account of what had passed on and since the hearing of the first summons.

Two answers were made before the justices as to the second summons. First, objection was taken that no date was laid in the summons for the alleged desertion. This is a point which might have been discussed with interest and perhaps with profit in the eighteenth century in the Court of King's Bench, but in my judgment it is not at the present day a point of substance. The real issue of fact was never for a moment in doubt. There can be no question that this objection to the summons was technical only, and that desertion had continued since August 3, 1922; at all events I think there is no substance in it and dismiss it.

The second objection was of a more serious character. Counsel for the husband cited *Fitzgerald* v. *Fitzgerald* (1), in which case there is a statement by Lord Penzance so precise that it has been relied upon as laying down a principle of law, in words which the Court has merely to construe textually. That statement is this: "Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists." It is a passage frequently relied on at the Bar, as if it were a text, governing all cases of alleged desertion that can arise, which the Court is only entitled to construe and apply. And in this case counsel for the husband asked: "How can it be said that a state of cohabitation existed in the face of its termination by the action of the public authorities, which action remained effective till 1902, and has never been followed by the resumption of a matrimonial home?" If that was the only matter affecting the jurisdiction, and if the judgment referred to is to be regarded as completely and exhaustively laying down the law, the objection might be well founded. But I am satisfied that it cannot be so regarded.

I look at the facts of the case with which Lord Penzance

(1) L. R. 1 P. & M. 694, 697.

was dealing. The wife in that case was living apart from the husband of her own choice, and she prayed in aid the jurisdiction to dissolve her marriage on the grounds of her husband's adultery and desertion of her; and it was in reference to that state of things that Lord Penzance used the words cited. That decision is not a decision that desertion cannot arise unless the parties have at the time of the alleged act a common home. Indeed in the very next paragraph of his judgment Lord Penzance dealt with exceptional cases in which desertion may arise, apart from the popular sense of the word (1): "No doubt there are cases," he said, "in which actual cohabitation does not exist at all, because the circumstances of the parties do not permit of it. I am not now dealing with such cases. No doubt, again, there are cases in which the parties may have innocently ceased for a time to be actually living together, separated by the calls of everyday life, or the exigencies of public duty, and the husband or wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again; and this may constitute desertion. For in truth, in such cases, the state of cohabitation was not, in the first instance, wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is practically to abandon it."

That is the broader doctrine with which my predecessor qualified his previous statement; and the matter is one which has constantly been arising since. It has been almost a commonplace in this Court to hold that in order to ascertain whether there has been desertion, you must look at the conduct of the parties. There may be no matrimonial home, and yet no forfeiture of the rights of the spouses. Desertion is not the withdrawal from a place, but from a state of things. The husband may live in a place, and make it impossible for his wife to live there, though it is she and not he that actually withdraws; and that state of things may be desertion of the wife. The law does not deal with the

(1) L. R. 1 P. & M. 697.

1922

PULFORD v. PULFORD.

The President.

mere matter of place. What it seeks to enforce is the recognition and discharge of the common obligations of the married state. If one party does not acknowledge them, the party who has so offended cannot be heard to say that he or she is not guilty of desertion on the ground that there has been no desertion by departure from a place.

In the same volume of the Law Reports with the case of *Fitzgerald* v. *Fitzgerald* (1) is to be found the case of *Gatehouse* v. *Gatehouse*. (2) There the separation was accounted for, but the Court held that the whole subsequent conduct of the husband showed that he did not intend to return to his wife.

I shall attempt no new definition. Definitions are dangerous, and the misapprehension in the argument for the husband in this case, is that it treats Lord Penzance's dictum as a comprehensive definition of desertion.

[His Lordship also referred to *Lawrence* v. *Lawrence*. (3)]

In this case cohabitation was necessarily suspended while the wife was in an asylum, but the conjugal duties of the husband had not ceased. What was his conduct? After remaining some time in Suffolk he removed to London and took another woman to himself, and that adulterous connection has subsisted ever since. Moreover he has been living under an assumed name. To say that his wife could under such circumstances, and with her limited means, have easily found him is to affront justice. The effect of his conduct and of his adultery is that his wife may complain of desertion during the whole period, for there has been a complete renunciation by him of every conjugal duty. I am satisfied that since 1905, at all events, there is clear evidence of continuous desertion, and that that was continuing on August 3, 1922. The justices have practically so found, and in my opinion they were right; and I take that view in spite of some narrowness of interpretation of *Fitzgerald* v. *Fitzgerald* (1), which may be found in the decisions of the Divisional Court.

[His Lordship referred to *Henty* v. *Henty*. (4)]

(1) L. R. 1 P. & M. 694.
(2) (1867) L. R. 1 P. & M. 331.
(3) (1862) 2 Sw. & Tr. 575.
(4) (1875) 33 L. T. 263.

1922

PULFORD v. PULFORD.

HILL J., in concurring generally, said: The legal relationship known as cohabitation was only suspended while the wife was in the asylum. There was ample evidence for the justices to hold that the husband intended to put an end to that relationship and that he did so. He was thereby guilty of desertion.

Appeal dismissed.

Solicitor for appellant: *C. T. Lewis.*

Solicitors for respondent: *John E. Gibbs & Co., for Gudgeons, Peacock & Prentice, Stowmarket.*

J. R. B.

ADMIRALTY.

1922
Nov. 7.

(IN PRIZE.)

THE HOFSFOS.

Prize Court—Decree of Condemnation—Proceeds transferred to Exchequer—Motion to set Decree aside—Jurisdiction.

At the hearing of a motion to set aside a decree of condemnation in prize it appeared that in execution of the decree the proceeds of sale had already been transferred from the Prize Court to the Exchequer.

Held, that there being no fund to which the jurisdiction of the Court could attach, the Court must decline to exercise jurisdiction and the motion must be dismissed.

MOTION on behalf of the Compagnie des Minerais (in liquidation) of Liège asking for leave to enter appearance, for an order setting aside a decree of condemnation made on March 22, 1916, and for a rehearing of the claim of the Crown for condemnation.

The motion was opposed by the Procurator-General on its merits and also on the preliminary ground that after the decree of condemnation the proceeds of sale in due course had to be transferred to the Exchequer and that the Prize Court was functus officio.

1922

THE HOFSFOS.

The facts and arguments sufficiently appear from the judgment.

Somervell in support of the motion.

J. Wylie for the Procurator-General.

THE PRESIDENT (SIR HENRY DUKE). In this case there was at the outbreak of war a company called the Compagnie des Minerais, having its headquarters at Liège, in Belgium. It was a company, apparently, largely constituted of proprietors who were aliens to Belgian rule, and in a considerable measure of German proprietors. It was engaged in international trade, and in trade which particularly affected Holland and Belgium by reason of their proximity to Germany and their convenience for German trade interests. Liège came to be occupied by the German forces. Thereupon, by virtue of a proclamation issued by His Majesty, the operations of companies carrying on business within the area of the German occupation in Belgium became operations of enemy subjects, in the contemplation, at any rate, of this Court. After the date of that proclamation there was seized on board the *Hofsfos* a cargo of pyrites of some 3000*l.* or 4000*l.* value which was brought into prize, and, as the subject-matter of an unlawful trading with enemies of the Crown, was condemned on March 22, 1916.

On November 7, 1922, the Court is moved by the liquidator of the Compagnie des Minerais, praying that the decree of condemnation may be set aside on the ground that, if the company had been in a position on March 22, 1916, to represent certain facts to the Court, there would have been no condemnation. Although the company was legally domiciled in territory which for belligerent purposes was German territory, nevertheless, it is said, this was a transaction outside German territory, and ought to be held to be a transaction of a neutral. Very nearly seven years have elapsed since the condemnation. Four years within a few days have elapsed since the authority of the Belgian Crown over its territory was restored at the armistice. Very nearly two years have

1922

THE HOFSFOS.

The President.

elapsed since the liquidator became acquainted with the facts on which he now founds his claim. And something else has happened. The judgment delivered in March, 1916, was after a long delay completely executed. The proceeds were paid over to the Exchequer in March, 1921, and there is no fund under the jurisdiction of the Court which could be dealt with under any order which might be made by the Court at the instance of the present applicants.

In these circumstances, Mr. Somervell, on behalf of the company, moves me to set aside the decree of condemnation made in March, 1916, or, at any rate, to order a rehearing so that what he alleges to be plausible grounds for the reconsideration of the decree might be fully considered. There are, no doubt, circumstances after the most prolonged lapse of time where the Court, if it finds itself in a position to do justice effectually where justice has failed in the course of some previous exercise of its jurisdiction, would set out to do justice; but it seems to me that the first requisite for consideration of an application of this kind is that the applicant shall, on the face of it, show some means whereby the obligation to do justice in this Court between captors and claimants may be the better discharged. Here the advantage in a decree in favour of the present applicant would be merely a tactical advantage. Mr. Somervell submits that although there is no fund in Court upon which the decree of the Court could operate, the conscience of the British Chancellor of the Exchequer might be moved by a declaration of the Court that its previous proceedings were erroneous. That is a function for the Court in prize of which nothing has been heard during the many centuries in which the jurisdiction in prize has been exercised. The procedure in prize, if it is looked at with reasonable care, is perfectly simple procedure, well designed to do justice between captors and claimants. It is a jurisdiction which proceeds in rem with regard to the subject-matter of the vessel or goods brought in, and it may proceed in personam with regard to any acts of persons who have become captors, or who have intervened. Here there is no fund, no res, to which the

1922

THE HOFSFOS.

The President.

jurisdiction of the Court attaches, or in respect of which it can be exercised, and there is no suggested delinquency on the part of any captor or any agent of the Crown. On that ground I decline jurisdiction in the case.

If it had been necessary to consider whether four years after the armistice, and nearly two years after the present claimant was notified of the situation in which the company stood, it was a proper thing that this Court should reopen a closed transaction, my present view is that I should have declined on the ground of delay to reopen the transaction. But I decline jurisdiction in this case upon the larger ground that there is nothing to which, according to the practice of the Court, the jurisdiction of the Court can attach. I dismiss this motion with costs.

Solicitors for the claimant: *Coward & Hawksley, Sons & Chance.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. M. T.

1922

Nov. 9.

ADMIRALTY.

THE THEODOROS; THE BLIDENSOL.

Shipping—Collision in Dock—Vessel moored with Ropes obstructing Waterway—Duty at Tide Time.

A vessel lying moored in a dock, with ropes out to the opposite side of the dock obstructing the waterway, owes a duty at tide time, when other vessels may be entering or leaving the dock, to have an efficient lookout, so that if necessary the ropes may be slacked away immediately.

ACTIONS (tried together) of damage by collision.

In the first action the plaintiffs were the owners of the steamship *Blidensol* and the defendants were the owners of the steamship *Theodoros*. In the second action the plaintiffs were the owners of the steamship *Skagerak* and the defendants originally on the record were the owners of the *Theodoros*. By their defence the owners of the *Theodoros* alleged that the collision was solely caused by the negligence of the *Blidensol*,

1922

THE THEODOROS; THE BLIDENSOL.

and accordingly the owners of the *Skagerak* added the owners of the *Blidensol* as defendants.

The facts, shortly stated, were that the *Theodoros* was entering Penarth Dock stern first in tow of a tug on the night of May 15, 1922. She had a boat in attendance on her, which was being rowed up the dock ahead of the tug, and the boatman hailed various vessels which had ropes out across the dock to slacken away their ropes. The tug passed the *Skagerak*, which had slacked down her rope, but came in contact with a wire which was out from the port bow of the *Blidensol* across to the opposite side of the dock, and in consequence the *Theodoros* came into collision both with the *Blidensol* and the *Skagerak*.

Those in charge of the *Blidensol* charged the *Theodoros* (inter alia) with failing to give due warning of her approach and with navigating at excessive speed. Those in charge of the *Theodoros* charged the *Blidensol* (inter alia) with failing to keep a good lookout, failing to slacken down the wire rope or to give timely warning of its presence. No charges of negligence were made against the *Skagerak* by either of the defendants in the second action.

Bateson K.C. and *Langton* for the *Blidensol*.
Stephens K.C. and *Dumas* for the *Theodoros*.
Noad for the *Skagerak*.

HILL J. These cases relate to events which happened in Penarth Dock on the night of May 15, 1922. The first action is between the owners of the *Blidensol* and the owners of the *Theodoros*. In the second action the owners of the *Skagerak* sue the owners of the *Theodoros* and, by amendment, they also sue the owners of the *Blidensol*, the first defendants in that action having pleaded that the collision complained of was wholly caused by the action of the *Blidensol*. The same question arises in both actions—namely, whether the collision between the *Blidensol* and the *Theodoros* was caused by the negligence of the *Blidensol* or by the negligence of the *Theodoros*.

1922

THE THEODOROS; THE BLIDENSOL.

Hill J.

It has been a matter of some controversy, but I think it is clear from the evidence that before there was any collision between the ships the tug *Salvor* had come into contact with the wire rope which led from the port bow of the *Blidensol* across the dock to the north side. In my view, upon the evidence of the *Blidensol* alone, it is clear that the collision between her and the *Theodoros* was solely due to negligence on the part of the *Blidensol*. The evidence from the *Theodoros* confirms that view.

The *Blidensol's* pleaded case is that she was lying at No. 6 tip with her ropes out; that the *Theodoros* approached at an excessive speed; that the *Blidensol*, seeing her coming, at once slacked away the port wire; but that the *Theodoros*, at the last moment working her engines, caused the head of the *Blidensol* to fall to port and away from the quay, and so brought about the collision. That case is not supported, so far as the *Blidensol* is concerned, by any evidence which has been offered by her to-day. Her witnesses say that they did not get proper warning of the *Theodoros* coming up the dock, and that the *Theodoros* came up the dock at excessive speed; but as to their port bow rope a totally different story is told, and it is admitted that until after the collision between the *Theodoros* and the *Blidensol* that rope never was slacked away at all. The suggestion is that it could not be slacked away, because at the critical time the chute was being elevated and they could not allow the head of the *Blidensol* to fall away while that was being done, because of the risk of the chute fouling the *Blidensol* and causing damage either to the chute or to the ship. What are the facts? The *Blidensol* had this rope out right across the dock, and it was a time of tide when it might have been expected that vessels would be moving into or out of the dock. She had no lookout. It was a fine night, but dark. She had no officer, at the critical time, on deck. The chief and second officers had been, for five or six minutes, in the chart room. The *Blidensol* had one man somewhere on the fore deck. In fact she heard the hail to slack away and she heard it in time for the man on the fore deck to go on the forecastle to slack away a rope,

and for him to complete that operation, and for the second officer to come from the chart room to the forecastle head and see that he had done it, while the *Theodoros* was still some little distance away from the *Blidensol*. Unfortunately, there being no officer in charge, the man mistook the rope; intending to slack away the port-bow rope, which led across the dock, he mistook for it a rope which led from the bitts on the port side across to the bitts on the starboard side and out on the starboard bow to the wharf, and he slacked that away. Clearly this blunder was really due to the fact that there was no proper officer in charge as there should have been at such a time, for such a ship as this, in such a dock, and this blunder fully accounts for the collision. I have no doubt that the head of the *Blidensol* did come out into the dock. The ships were lying in some places four abreast, and the narrow passage way was very much restricted, and the head of the *Blidensol* must have come somewhat out into that passage way.

I find as a fact that the tug came into contact with the port-bow rope, that she hailed the *Theodoros* to go full speed ahead, that the *Theodoros* went full speed ahead, and that she dropped her port anchor. It may well be that this tended to give the stern of the *Theodoros* a cant to starboard and so made it possible for the head of the *Blidensol* to strike the port quarter of the *Theodoros*. I am not prepared to find on the evidence that the *Theodoros* was proceeding at too high a rate of speed. It is suggested that she by her agent, the boatman, or some one else, ought to have given an earlier warning to the *Blidensol*, so that the *Blidensol* could have had a longer time and earlier intimation that she ought to slack away her rope. In my view the *Blidensol* had warning in time. I have not, therefore, to determine what warning it is the duty of a ship proceeding up the dock to give ; but I wish most emphatically to say that in my opinion ships which lie in the Penarth Dock with ropes out right across the dock are not entitled, at times of tide when it is likely that ships will be entering or leaving the dock, to lie there without a lookout and without being ready to act immediately by letting go

1922

THE THEODOROS; THE BLIDENSOL.

HILL J.

these obstructive ropes. I think that if ships choose to have ropes out across a dock and it is necessary to have them across the dock, at least a most vigilant lookout should be kept on board at a time when ships may be moving in the dock. In both cases I find the *Blidensol* alone to blame.

In the first action brought by the owners of the *Blidensol* against the owners of the *Theodoros* I give judgment for the defendants with costs.

As regards the second action, I can see no justification for saying that anything which the owners of the *Blidensol* did induced the owners of the *Skagerak* to sue the owners of the *Theodoros*, and accordingly I shall not order the unsuccessful defendants to pay the costs of the successful defendants. I give judgment for the plaintiffs, the owners of the *Skagerak* against the owners of the *Blidensol* with costs and for the owners of the *Theodoros* against the plaintiffs with costs.

Solicitors for the owners of the *Blidensol: Ince, Colt, Ince & Roscoe.*

Solicitors for the owners of the *Theodoros: Holman, Fenwick & Willan.*

Solicitors for the owners of the *Skagerak: William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

E. C. M. T.

DIVORCE.

1922
Dec. 5, 6, 12.

GRAHAM *v.* GRAHAM.

Judicial Separation—Jurisdiction—Residence—Service—Respondent having a Foreign Domicil and not Resident within the Jurisdiction at the Time of Service and of the Commencement of Proceedings—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 22, 41, 42—*Statute of Citations,* 1531 (23 *Hen.* 8, *c.* 9), *s.* 2.

It is established by the cases of *Armytage* v. *Armytage* [1898] P. 178, and *Anghinelli* v. *Anghinelli* [1918] P. 247, that, according to the practice of the Ecclesiastical Courts, a suit for judicial separation, which is now substituted for the divorce a mensa et toro, can be entertained in a case where both parties are resident but not domiciled within the jurisdiction. But the Court has no jurisdiction to maintain a suit against a respondent who at the time of his citation or of the institution of the suit is resident out of the jurisdiction. The Statute of Citations, 1531, s. 2, which forbade the Ecclesiastical Courts to cite any person out of the diocese where he was inhabiting or dwelling, must be taken to have limited the jurisdiction and not only the power of service of the Ecclesiastical Courts. And s. 42 of the Matrimonial Causes Act, 1857, which permits service within or without His Majesty's Dominions, cannot extend the jurisdiction.

WIFE'S suit against her husband for judicial separation on the ground of cruelty.

The husband's domicil of origin was Scotch, and it was not suggested that it had ever been changed. The parties were married in India in the year 1912, and resided there or in Egypt until 1920. They resided in England at various places, including Savernake, from August 1 to September 1, 1920, and in London for various periods between November 9, 1920, and January 20, 1921. From January 23 to January 28, they resided at Mentone in France, when they separated, the wife returning to England, where she remained. The husband went to serve in Mesopotamia. The petition was filed on February 24, 1922, alleging acts of cruelty in England and India, and was served on the husband at Baghdad. An appearance was entered by the husband under protest, and an Act on Petition was filed on June 14, 1922, alleging that the Court had no jurisdiction to entertain the suit as against the husband.

1922

GRAHAM v. GRAHAM.

Bayford K.C. and *Cotes-Preedy* for the Act on Petition. In order to give the Court jurisdiction to entertain this petition there must be: (1.) a matrimonial residence in this country; or (2.) both parties must be here at the commencement of the proceedings; or (3.) a domicil here. In this case there is no suggestion of an English domicil. There does not seem to have ever been a matrimonial residence here, and there certainly was not one when the proceedings commenced; and the husband was not then resident here.

The suit for judicial separation was created by ss. 16 and 17 of the Matrimonial Causes Act, 1857, in the place of the old suit for divorce a mensa et toro. Sect. 42 permits service out of the jurisdiction. That section is dealt with in *Firebrace* v. *Firebrace* (1), which shows that it does not extend the jurisdiction of the Court, but only gives facility of service; and Sir James Hannen P. refers to *Yelverton* v. *Yelverton* (2) as showing that the Court had no jurisdiction over a husband abroad. The old petition for divorce a mensa et toro could not be served outside the jurisdiction; so the Ecclesiastical Courts had no jurisdiction over a husband abroad.

In *Armytage* v. *Armytage* (3) and in *Anghinelli* v. *Anghinelli* (4), residence of both parties in England at the time the suit was commenced was held to give jurisdiction without domicil, but there is no case where residence of the petitioner alone has been held sufficient.

[*J. B. Matthews K.C.* referred to a dictum of Jeune P. in *Christian* v. *Christian* (5), that a suit for judicial separation can be founded on residence only, quoting *Manning* v. *Manning*. (6)]

In *Manning* v. *Manning* (6) Lord Penzance referred to the question, but said it did not arise, because the alleged residence of the petitioner was not bona fide.

The whole question is whether a petitioner could have brought a suit for divorce a mensa et toro when he or she

(1) (1878) 4 P. D. 63, 68.
(2) (1859) 1 Sw. & Tr. 574, 586.
(3) [1898] P. 178.
(4) [1918] P. 247.
(5) (1897) 78 L. T. 86.
(6) (1871) L. R. 2 P. & M. 223.

only was resident in the jurisdiction and the respondent was not. If both were resident in the jurisdiction the Court could deal with them, but not otherwise.

[They also referred to *Riera* v. *Riera* (1); Shelford on Marriage (1841), p. 486.]

J. B. Matthews K.C. and *Acton Pile* for the petitioner. The jurisdiction of the Ecclesiastical Courts extended over all persons belonging to the Christian Church: *Niboyet* v. *Niboyet*. (2) It was the practice as a matter of courtesy not to serve process in another diocese, and that practice was enforced by the Statute of Citations, 1531; that practically limited the exercise of the jurisdiction, but the jurisdiction of the Courts was not changed. When the Statute of Citations, 1531, was practically repealed by s. 42 of the Matrimonial Causes Act, 1857, the jurisdiction was freed from the fetter.

The presence of the petitioner within the jurisdiction is enough, because she is entitled to the protection of the Court: Rayden on Divorce, p. 15, s. 34, quoting Lord Watson's observations in *Le Mesurier* v. *Le Mesurier*. (3)

Dasent v. *Dasent* (4) is in our favour; and it appears that in *Manning* v. *Manning* (5) Lord Penzance would have made the order had the petitioner's residence been bona fide. In *Collett* v. *Collett* (6) service abroad was held to be good in spite of the statute.

Residence has been held sufficient to give jurisdiction to decide cases of nullity of marriage where parties were domiciled elsewhere: *Sottomayor* (*otherwise De Barros*) v. *De Barros* (7); *Roberts* (*falsely called Brennan*) v. *Brennan*. (8)

In *Whitcomb* v. *Whitcomb* (9) service of proceedings, taken by the husband for restitution of conjugal rights, on the wife in another diocese by letters of request, was held good for the purpose of proceedings in contempt.

(1) (1914) 31 Times L. R. 50.
(2) (1878) 4 P. D. 1.
(3) [1895] A. C. 517, 526.
(4) (1849) 1 Rob. Ecc. 800.
(5) L. R. 2 P. & M. 223.
(6) (1843) 3 Curt. 726, 731, 732.
(7) (1877) 2 P. D. 81; reversed 3 P. D. 1, but not on the question of jurisdiction.
(8) [1902] P. 143.
(9) (1840) 2 Curt. 351.

1922

GRAHAM v. GRAHAM.

Bayford K.C. in reply referred to *Morse* v. *Morse* (1) and *Donegal* v. *Donegal.* (2)

Cur. adv. vult.

Dec. 12. HORRIDGE J. [after stating the facts continued :] It was not contended before me that the respondent was resident in England at the time of the petition, or indeed that he had been in England at any time after January 20, 1921, when he left for Mentone ; but it was argued that the fact of the petitioner herself being resident in England entitled her to invoke the protection of the Court, no matter where her husband was resident.

By s. 22 of the Matrimonial Causes Act, 1857, it is provided that, "In all suits and proceedings other than proceedings to dissolve any marriage, the Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief."

It becomes necessary to consider, having regard to the above provision, the matters which were in the Ecclesiastical Courts requisite to enable the Court to grant a decree of divorce a mensa et toro.

The first matter to be looked at is the Statute of Citations (23 Hen. 8, c. 9). This statute provided that no manner of person should be cited before any of the Ecclesiastical Courts mentioned out of the diocese where the person cited should be inhabiting and dwelling at the time of awarding or going forth of the citation.

It was suggested on behalf of the petitioner that the passing of this statute showed there would have been jurisdiction, prior to the statute, to cite parties not in residence within the jurisdiction. This however was not the view taken by Dr. Lushington in *Collett* v. *Collett* (3), where he says : "The Court always looks, on a question of jurisdiction, to the Statute of Henry 8 (c. 9), which was passed in affirmance

(1) (1828) 2 Hagg. Ecc. 608. (2) (1821) 3 Phillim. 586.
(3) 3 Curt. 726, 729.

of the Common Law, and by which this Court, among others, has local limits assigned to it."

By the Matrimonial Causes Act, 1857, ss. 41 and 42, this Act of Henry VIII., so far as regards service outside the jurisdiction of the particular Court, has been nullified, as any proceedings in the Divorce Court properly brought for judicial separation can now be served either within or without His Majesty's Dominions.

After the passing of the Matrimonial Causes Act, 1857, the question arose as to whether or not a suit for judicial separation could be brought in this Court where the parties were not domiciled here, and it was decided in the cases of *Armytage* v. *Armytage* (1) and *Anghinelli* v. *Anghinelli* (2), that a suit for judicial separation could according to the former practice of the Ecclesiastical Courts, and therefore under the provisions of s. 22 of the Matrimonial Causes Act, 1857, according to the procedure and practice of this Court, be entertained where both the parties were resident within the jurisdiction of this Court; but in neither of these two cases was it expressly decided whether the residence of the petitioner alone would be sufficient to give the Court jurisdiction.

In a passage in the judgment of Sir James Hannen in the case of *Firebrace* v. *Firebrace* (3), referred to in the judgment of Gorell Barnes J. in *Armytage* v. *Armytage* (4), he used the following phrase: "It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident though not domiciled"; but I do not think the learned President intended in using the phrase "in which she is resident" to mean "and in which the husband is not resident," or to decide the question as to whether or not mere residence of the petitioner is sufficient.

The case of *Niboyet* v. *Niboyet* (5) decided that residence and not domicil was necessary to give jurisdiction in divorce; and though this view, as pointed out by Gorell Barnes J. in

(1) [1898] P. 178.
(2) [1918] P. 247.
(3) 4 P. D. 63, 67.
(4) [1898] P. 178, 193.
(5) 4 P. D. 1.

1922

GRAHAM v. GRAHAM.

Horridge J.

Armytage v. *Armytage* (1), has now been overruled, the judgments of James and Cotton L.JJ. in this case as to what residence was necessary to found jurisdiction in the Ecclesiastical Courts were cited with approval by Swinfen Eady M.R. and Warrington L.J. in *Anghinelli* v. *Anghinelli*. (2)

In *Niboyet* v. *Niboyet* (3), Cotton L.J. says: "In *Yelverton* v. *Yelverton* (4), which was a case relied upon as supporting the judgment under appeal, the respondent was not domiciled in England or resident here; and the decision in effect was that the Court had no jurisdiction to cite him—that is no jurisdiction over him personally, he not being resident here, and that the fact of his not being resident here was pointedly before the learned judge when he gave his judgment appears from a passage of the report, 'Major Yelverton is not an Englishman; he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England; and from the passage which I have read from the report of *Carden* v. *Carden* (5), I infer that Dr. Lushington would have held that there was no jurisdiction unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest.'"

I would also call attention to the fact that *Carden* v. *Carden* (5) is also referred to by Swinfen Eady M.R. in *Anghinelli* v. *Anghinelli* (6), where he says: "There is a case of *Carden* v. *Carden* (7), in which, as appears from the judgment, what the Court was considering was the question of residence and not domicil, and it was held that it was residence within the diocese before the issue of the citation which gave the Court jurisdiction."

On referring to *Carden* v. *Carden* (7) it seems clear that the Court considered the residence or non-residence of the party proceeded against as vital, as these words occur in the

(1) [1898] P. 178, 193.
(2) [1918] P. 247, 252, 253, 255.
(3) 4 P. D. 1, 24.
(4) 1 Sw. & Tr. 574.
(5) (1837) 1 Curt. 558.
(6) [1918] P. 247, 254.
(7) 1 Curt. 558, 559.

judgment: "There is nothing here to show that the party proceeded against ever had any residence in the diocese"; and it is only upon evidence subsequently filed as to the residence of the husband that the Court pronounced decree.

On behalf of the petitioner stress was laid on *Dasent* v. *Dasent* (1), but in that case the Court gave no reasons for thinking it right to pronounce the decree; and this fact is dealt with and commented on in *Yelverton* v. *Yelverton*. (2)

In *Manning* v. *Manning* (3) the Judge Ordinary says: "It appeared likely that the Court would have to determine under what circumstances, and to what degree or extent residence, and nothing more than residence, may be sufficient to enable a petitioner to sue in this Court; but I forbear to enter upon the investigation of this question."

In my view the authorities referred to in the judgment of Cotton L.J. in *Niboyet* v. *Niboyet* (4), and also the case of *Donegal* v. *Donegal* (5), show that where residence is relied upon to found jurisdiction it must be shown that the respondent is resident in the jurisdiction at the time of the citation being issued and the proceedings commenced.

I was very much pressed on behalf of the petitioner with the case of *Roberts* v. *Roberts* (6), in which Sir Francis Jeune P. stated that in his view residence and not domicil was the test of jurisdiction in a nullity case, because it was said in that case on the report there was no evidence of either party having been resident within the jurisdiction; but on production of the original citation which I sent for it appeared that the wife had given an address within the jurisdiction. The report in this case is not to my mind satisfactory as to the evidence of residence before the Court, and I cannot think I ought to rely on it if it is inconsistent with the authorities I have already referred to.

It was further contended before me that because s. 42 of the Matrimonal Causes Act, 1857, provided for service within

(1) 1 Rob. Ecc. 800.
(2) 1 Sw. & Tr. 574.
(3) L. R. 2 P. & M. 223, 225.
(4) 4 P. D. 1.
(5) 3 Phillim. 597.
(6) [1902] P. 143, 144.

1922

GRAHAM v. GRAHAM.

Horridge J.

or without His Majesty's Dominions, if service was in fact effected of proceedings issued without jurisdiction, the very fact of service gave jurisdiction to the Court; but I cannot accede to this proposition, as it seems to me that s. 42 only applies to process properly instituted.

The prayer of the Act on Petition will be granted and the suit will be dismissed; the wife to have costs up to the amount of security.

Solicitors for the respondent: *Oldfields.*

Solicitor for the petitioner: *C. E. W. Ogilvie.*

J. R. B.

1922

Oct. 19, 23.

[IN THE KING'S BENCH DIVISION.]

PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS-THE-MARTYR, WITH ST. MARGARET, NEW FISH STREET, AND ST. MICHAEL, CROOKED LANE, LONDON *v.* CHANCELLOR OF THE DIOCESE OF LONDON AND OTHERS.

[No. 162, Crown Paper.]

Ecclesiastical Law—Faculty—Citation—Parochial Church Council—Church of England Assembly (Powers) Act, 1919 (9 & 10 *Geo.* 5, *c.* 76), *s.* 4—*Parochial Church Councils (Powers) Measure*, 1921 (*No.* 1), *cl.* 4—*Prohibition—Delay—Discretion—Practice.*

In a cause of faculty commenced by citation in the Consistory Court, praying for the removal of certain ornaments alleged to have been illegally placed in a parish church, the Chancellor ordered the faculty to issue within one month without informing himself at the hearing of the views of the Parochial Church Council. The Parochial Church Council allowed the month to elapse, and, on its expiry, applied for prohibition on the grounds that they had not been cited, and that their views had not been considered:—

Held, that even if the alleged error were one of jurisdiction, and not merely of procedure, still there had been such unreasonable delay on the part of the Council that prohibition should be refused as a matter of discretion.

Semble (per Sankey J.). A Parochial Church Council has a right to be heard in a faculty case.

ADJOURNED SUMMONS.

1922

PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS, ETC. *v.* CHANCELLOR OF LONDON DIOCESE.

Application by Summons (1) on behalf of the Parochial Church Council of the United Parishes of St. Magnus-the-Martyr, St. Margaret, New Fish Street, and St. Michael, Crooked Lane, in the City and Diocese of London, for a writ of prohibition to be directed to the Chancellor of the Diocese of London, and to Alfred Gill, Walter Charles William Vincent, and Walter Bolton Evans, restraining further proceedings under an order of the Consistory Court of London, dated July 29, 1922.

The petition of Alfred Gill, W. C. W. Vincent and W. B. Evans, parishioners of the united parishes, had been presented to the Consistory Court on April 13, 1922, alleging that certain ornaments or furniture had been introduced, erected or fixed by the Rev. Henry Joy Fynes-Clinton, the incumbent, within the parish church of St. Magnus-the-Martyr, since May 31, 1921, without the licence or faculty of the Court. (The nature of the articles appears from the minutes of the Chancellor's order below.) Para. 5 of the petition was in these words: "5. That there is no Parochial Church Council, and that the approval of the Vestry was not obtained nor was the Vestry consulted by the said incumbent before he introduced the said articles or any of them."

The petition further alleged that all the articles in question were illegal, and had been illegally introduced and erected, and prayed the Court to decree a licence or faculty to issue for their removal.

Some delay in the issue of process was caused by the death of the then Chancellor (the late Sir Alfred Bray Kempe) on April 21, 1922.

On April 24, 1922, a Parochial Church Council for the united parishes was duly constituted, under the provisions of the Parochial Church Councils (Powers) Measure, 1921

(1) R. 70 of the Crown Office Rules, 1906, runs: "An application for a writ of prohibition on the Crown side shall be made by motion to a Divisional Court during the Sittings for an order nisi in all criminal matters, and in vacation by summons before a judge at chambers, and in civil proceedings on the Crown side by motion for an order nisi or by summons before a judge at chambers."

1922

PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS, ETC. v. CHANCELLOR OF LONDON DIOCESE.

(No. 1), (1) which acquired the force of law by virtue of the Church of England Assembly (Powers) Act, 1919 (9 & 10 Geo. 5, c. 76), s. 4.

The citation was issued on June 23, 1922, and published in the usual way, citing "all persons having or pretending to have any interest in the premises" to enter an appearance in the Registry of the Court "within fifteen days after service hereof." No appearance was entered by either the rector, the churchwardens, the vestry, or the Parochial Church Council.

On July 29, 1922, the Chancellor (F. H. L. Errington, Esq.) sat in the Consistory Court (2), for the hearing of the petition. Counsel appeared for the petitioners. A solicitor attended to watch the proceedings on behalf of the rector. Mr. Walter George Greenwood, one of the churchwardens of St. Margaret, New Fish Street, made a statement at his own request.

The Chancellor made an order according to the following minutes: (1.) That a faculty issue for the removal from the church of the following articles referred to in the petition: (*a*) the tabernacle, (*b*) the gilded throne, (*c*) the oil lamp, (*e*) the second Holy Table, (*f*) the picture of the Madonna and Child, (*h*) the holder for candles, (*i*) the holy water stoup, (*j*) the vat and brush, (*k*) the crucifix, (*l*) the small crucifix, (*m*) the St. Veronica picture, (*n*) the catafalque, (*o*) the sepulchre, (*q*) the English missal. But the faculty not to issue for one month in order to give the rector and churchwardens of St. Magnus an opportunity of removing the same articles which they are hereby authorized and required to do. (2.) As to the remaining articles (other

(1) Clause 4 of the Parochial Church Councils (Powers) Measure, 1921, transferred to the council of every parish (i.) all powers, duties and liabilities of the vestry of such parish (with certain exceptions) relating to the affairs of the church; and (ii.) all powers, duties and liabilities of the churchwardens of such parish relating to (*b*) the care, maintenance, preservation and insurance of the fabric of the church and the goods and ornaments thereof.

The text of these "Measures" is published periodically by the Incorporated Council of Law Reporting. *No.* 1 of 1921 will be found in the part for *June*, 1922.

(2) The Court sat in the North Transept of St. Paul's Cathedral.

than the censer and boat), if a confirmatory faculty is not obtained for the same within three months, or such extended time as may be allowed by the Court, the petitioners to be at liberty to apply in chambers for their removal. (3.) No order as to the censer and incense boat. (4.) No order as to costs. (5.) The petitioners to be at liberty to apply as to the mode of dealing with any articles they may remove under the faculty.

On August 16, 1922, the Parochial Church Council met (the rector being ex officio in the chair) and passed a resolution, authorizing an application to a Court of law to prevent the threatened removal of the ornaments of the church.

On August 29, 1922, ex parte application was made to Swift J., sitting for the vacation judge in chambers, for an order that all proceedings under the order of the Consistory Court be stayed pending the hearing of the application, and for a writ of prohibition. Swift J. granted the order to stay and allowed the summons for prohibition to issue. On September 5, 1922, the vacation judge (Romer J.) adjourned the summons by consent to the Divisional Court.

The adjourned summons thus came up for argument. The Chancellor was not represented, but an affidavit by Mr. F. Hugh Lee, Joint-Registrar of the Diocese of London, was filed on behalf of the respondents, dealing with the procedure at the hearing.

E. W. Hansell and *C. Johnston Edwards* for the applicants, the Parochial Church Council. The Parochial Church Council was neither heard nor consulted. No such council was in existence, it is true, at the date of the presentation of the petition, but it was in existence at the date of the issue of the citation, which was the real commencement of the proceedings. By the legislation effected under the joint operation of the Church of England Assembly (Powers) Act, 1919, and the Parochial Church Councils (Powers) Measure, 1921, the Parochial Church Council acquired a statutory position equivalent to those of the vestry and churchwardens at common law. That position entitles the

1922

PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS, ETC. v. CHANCELLOR OF LONDON DIOCESE.

Council to be heard, and to put its views before the Consistory Court, not as necessarily binding upon the Ordinary, but, at the lowest, as a factor to be considered before a final decree is made in a faculty case. Here the decree was made against the council in absentia. Its statutory rights have been infringed. In other words, a statute has been misconstrued, which, it is submitted, affords ground for prohibition. In this matter, the Council have their constituents — the parishioners and congregation—behind them.

On the law of prohibition to the Ecclesiastical Courts, counsel cited: *Gould* v. *Gapper* (1); *Burder* v. *Veley* (2); *Ex parte Smyth* (3); *Martin* v. *Mackonochie* (4); *Rex* v. *Tristram.* (5)

It is submitted that a faculty to remove ornaments should not be granted without, at least, ascertainment of the views of the Parochial Church Council. Here the Council had no notice of the proceedings. They were not cited in their corporate capacity. (6) The publication of the citation on the church door was insufficient.

[AVORY J. What better notice could they have had? Surely the members of such a Council are presumed (if anybody is) to attend their parish church.]

In any case here was a statutory body in existence which was wrongfully assumed (from para. 5 of the petition) to be non-existent. That body had certain rights, and such rights were ignored at the hearing. An order so made is, it is submitted, defective in jurisdiction and ought not to be allowed to be acted upon.

Inskip K.C. and *Wilfrid Lewis* for the respondents, the petitioners in the Consistory Court. Here the applicants, the Parochial Church Council, are out of Court. They simply lay by. They allowed the Court to proceed, without disclosing their objection, and now come to set aside the proceedings.

(1) (1804) 5 East, 345.
(2) (1840) 12 Ad. & E. 233, 265.
(3) (1835) 3 Ad. & E. 719.
(4) (1878) 3 Q. B. D. 730, 739.
(5) [1902] 1 K. B. 816.
(6) [In the case of *Thusfield and Jones* ((1680) Skin. 27) it was held that the Wax Chandlers Company was sufficiently cited by a citation to the master and wardens by name.—W. D. T.]

See per Collins M.R. in *Rex* v. *Tristram* (1), at p. 829. A party so applying has lost his right by laches, and, even in the case of absence or excess of jurisdiction, it is discretionary with this Court to refuse the writ. See per Lush J. in *Martin* v. *Mackonochie* (2): "Irregularity in procedure is matter of appeal, not of prohibition." If there has been any error in procedure here it can be corrected by the proper tribunal, the Arches Court.

Hansell in reply.

LORD HEWART C.J. This is a summons for a writ of prohibition on behalf of the Parochial Church Council of certain parishes in the city of London. The relevant facts are as follows. Under the Act of 1919 and the Measure of 1921, a Parochial Church Council, when constituted, assumes certain duties hitherto performed by the vestry and churchwardens. The petition, presented on April 13, 1922, stated (as the fact then was) that there was no Parochial Church Council. But such a council was, in fact, constituted on April 24, 1922, and was thus in existence when the citation was issued on June 23, 1922. The Chancellor of the Diocese, on July 29, 1922, made an order that a faculty issue for the removal of certain articles, but the issue of such faculty was suspended for one month, to give the rector and churchwardens an opportunity of removing the articles. The present applicants, the Parochial Church Council, complain that the Chancellor acted in excess of his jurisdiction, by making such order in their absence, and by not hearing the Council, and informing himself of their views, before making the order. On these grounds a writ of prohibition is sought.

The principles on which prohibition will lie in an ecclesiastical suit were explained by Thesiger L.J. in *Martin* v. *Mackonochie* (3) as follows: "The mode in which that suit is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision

(1) [1902] 1 K. B. 816. (2) (1878) 3 Q. B. D. 730, 739.
(3) (1879) 4 Q. B. D. 697, 732.

1922

PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS, ETC. v. CHANCELLOR OF LONDON DIOCESE.

Lord Hewart C.J.

relating to these matters, to be regulated by the practice of the Court itself, and in respect of which if the judge errs, appeal and not prohibition would be the proper remedy, unless his error involves the doing something which in the words of Littledale J. in *Ex parte Smyth* (1) is 'contrary to the general laws of the land,' or to use the language of Lush J. in the Court below (2), is 'so vicious as to violate some fundamental principle of justice.'"

Nothing is here suggested to have been done contrary to general law or to fundamental justice. There was sufficient notice to the parishioners and congregation (categories embracing the members of the Parochial Church Council) given by the publication of the citation. The interests of the rector were watched by a solicitor at the hearing, who is now instructing counsel for the applicants. One of the churchwardens was present and made some statement. I am by no means sure that what is here complained of is not merely matter of procedure—namely, that the Chancellor omitted to inform himself of the views of the Council—views which, admittedly, would not have been binding upon him. But even if such a matter went to vitiate the jurisdiction, the writ of prohibition is not a matter of absolute right but is discretionary with this Court, and may be refused on the ground of unreasonable delay. See per Collins M.R. in *Rex* v. *Tristram* (3), citing Lopes L.J. in *Farquharson* v. *Morgan* (4): "It is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled."

Here the applicants have allowed at least two months to elapse before coming to the High Court. They are thus precluded by their own conduct, and their application for prohibition fails and must be dismissed.

AVORY J. I am of the same opinion. What is complained of here is matter of procedure, not of jurisdiction. As to the

(1) 3 Ad. & E. 719.
(2) 3 Q. B. D. 730, 739.
(3) [1902] 1 K. B. 816, 829.
(4) [1894] 1 Q. B. 552, 559.

complaint that the Council was not heard, having regard to the facts, the members of the Council must be presumed to have had notice of the proceedings. Their course was simply one of lying by. In the words of Lord Selborne L.C. in *Mackonochie* v. *Lord Penzance* (1): "Supposing no statute to intervene, the Ecclesiastical Courts must have jurisdiction to determine questions of this nature; and, if they have jurisdiction, prohibition does not lie to them from the temporal Courts. The remedy (if there be any error in judgment) is by appeal." The present application therefore fails.

SANKEY J. The applicants here assert that they were entitled to be heard in the Consistory Court. In my view, a Parochial Church Council has a right to be heard in a faculty case, by reason of clause 4 of the Measure of 1921 transferring to such Council the powers and duties of the vestry and churchwardens at common law.

But looking at these proceedings as a whole, ought the writ to go? The rector (ex officio chairman of the Council) was represented at the hearing. One of the churchwardens was called. In *London Corporation* v. *Cox* (2) the opinion of the judges was delivered by Willes J., recognizing that the right to a writ of prohibition may be lost by laches, and does not lie as of course. In my opinion the applicants here are precluded by their conduct, and the writ ought not to go.

Summons dismissed.

Solicitors for the applicants (the Parochial Church Council): *Whitehouse, Etherington & Co.*

Solicitors for the respondents (the petitioners in the Consistory Court): *Sharp & Benest.*

(1) (1881) 6 App. Cas. 424, 431. (2) (1867) L. R. 2 H. L. 239, 279.

W. D. T.

Distinguished. In the Goods of Spicer, [1949] P. 441

1922
July 27, 28, 29, 31.
C. A.
Nov. 14, 15.

[IN THE PROBATE, DIVORCE AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

In the Estate of ROWLAND JOHN BEECH (Deceased).

BEECH *v.* PUBLIC TRUSTEE and Others.

Will—Probate—Knowledge and Approval—Testator's Mistake as to legal Effect of Words approved—Power of Court to exclude from Probate particular Words—Soldier's Will—Want of testamentary Intention in Document propounded.

A testator cannot make an approval of the words which have been put into his intended will conditional upon their having in law the effect he desires. If he executes a will knowing and approving the words used, the Court cannot afterwards exclude from probate words which have been put into the will on the ground that the testator has taken a view of their legal effect which turns out to be mistaken.

So *held* by Salter J.

A letter which may be otherwise admissible as a soldier's will must be testamentary in character and intention. There is no difference in this respect between the will of a soldier and that of a civilian executed with the formalities of the Wills Act.

So *Held* by the Court of Appeal, affirming the decision of Salter J.

A testator, who, by his will dated in 1917, had made certain dispositions of his property, in March, 1918, while on active service in France, wrote two letters to his son containing statements, in some respects inaccurate, as to how he had disposed of his property. There was no indication in the letters of any intention to alter the dispositions he had made by his will:—

Held, by the Court of Appeal, affirming the decision of Salter J., that the letters were not expressions of what the testator wished to be done with his property, but were only statements, partly erroneous, of what he thought he had done, and they could not be admitted to probate as a soldier's will.

Colonel Rowland John Beech by his will, dated February 23, 1917, appointed the Public Trustee executor and trustee; and after confirming a deed poll under his hand and seal, indorsed upon an indenture of November 28, 1885, made between the testator of the first part, C. M. Beech and H. E. Beech of the second part, and Thomas Fisher of the third part, being the settlement of his Brandon Estate in the county of Warwick, made on his marriage; and reciting that by virtue of an indenture of settlement dated November 28, 1885, made between the same parties as the

last-mentioned indenture, his Shawe Estate in the county of Warwick then stood limited and settled (subject to a jointure rentcharge of 1500*l.* a year, and to 25,000*l.* being portions for his younger children) to such uses as he should by deed or will appoint, and subject to any such appointment to the use of himself for life with remainders over; he in exercise of all powers thereunto him enabling, appointed and declared that his eldest daughter, Mrs. Allen, should have the right to occupy during her lifetime the house known as "The Shawe" on his said Shawe Estate (such right to include the enjoyment of all sporting rights over the Shawe Estate), she keeping the house in repair and paying all rates and taxes, "but such right of my said daughter Mrs. Allen to occupy the said house shall be without prejudice to the right of my son Douglas Charles Murray Beech or any of his issue who shall succeed as tenant in tail immediately after my death to receive the rents and profits of the Shawe Estate." And after giving a number of specific and pecuniary bequests the testator proceeded, "I devise and bequeath all the rest residue and remainder of my real and personal estate whatsoever and wheresoever (including leaseholds and chattels real) of or to which I shall be possessed or entitled at the date of my death or over which I shall then have a general power of appointment by will unto and to the use of the Public Trustee," upon trust for sale and conversion; and out of the proceeds to pay his funeral and testamentary expenses, debts and legacies; and to stand possessed of the proceeds in trust for his three children, one half for the plaintiff, Douglas Charles Murray Beech, and one fourth each for Mrs. Christabel Allen and Miss I. F. Beech; and he provided that if any moneys, charged upon the Shawe Estate in favour of his daughters, should be raised at the request of either of them, the sum so raised should be brought into account in ascertaining their shares in his residuary estate; and he directed that his daughters' shares should be settled upon them for life with remainder to their children.

Both the Shawe Estate, valued at 83,000*l.*, and the Brandon Estate, valued at 30,000*l.*, stood limited under the settlements

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

mentioned in the will to such uses as the testator should by deed or will appoint, and subject thereto and to charges for his wife's jointure and portions for his younger children, to the testator for life, remainder to his sons successively in tail, with remainders over. The testator's eldest son was killed in action in 1915.

The testator was on active service in France during most of the war, and while on active service wrote to his younger son, Douglas Charles Murray Beech, two letters dated respectively March 16, 1918, and March 23, 1918. The first of these letters had been lost, but it was proved by his son to have contained the words, " I daresay you would like to know that I have left you after me both the Brandon and the Shawe Estates, also the London House." The second letter contained the following passage: " When I told you about Shawe going to you after me I should have also said that Kitty " (Mrs. Allen) " will be able to use the house if she wishes during her lifetime she paying the house rates. I take it Brandon will be sufficient for a residence for you and Clare."

The testator died on August 20, 1919, leaving his wife and the three children, mentioned in his will, surviving. His son and Mrs. Allen each had an infant child living.

The said will was proved in common form on November 27, 1919, with one codicil dated February 4, 1918, which did not affect the questions in this action.

In November, 1920, a summons was taken out in the Chancery Division by the Public Trustee, asking for a declaration that the residuary devise in the testator's will did not operate as an exercise of the general powers of appointment contained in the settlements of the Shawe and Brandon Estates.

On June 12, 1921, this action was commenced in the Probate Division by the testator's son, Douglas Charles Murray Beech, against the Public Trustee and his sisters and the infant child of Mrs. Allen, asking for revocation of the probate granted and a grant of probate of the will omitting the words " over which I shall then have a general power of appointment," on the ground that the testator did not know

of or approve them, and of the codicil already proved and two further codicils being the letters of March 16 and 23, 1918, which were claimed to be effective as soldiers' wills.

After this action was commenced, but before the hearing, Peterson J. decided on the summons that there were expressions in the will which prevented the residuary gift operating as an exercise of the testator's general power of appointment over the Shawe Estate, but that it did operate as an exercise of the power over the Brandon Estate, and that, therefore, the plaintiff was only entitled to half the Brandon Estate instead of the whole. An appeal from this decision had been entered.

The action now came on for trial.

Hawke K.C. and *Noel Middleton* for the plaintiff. It is clear from the evidence that the testator intended both the Shawe and Brandon Estates to go under the settlement to his son, and therefore cannot have intended the words which by exercise of his power of appointment included them in the gift of residue. The fact that the will was read over to him does not exclude evidence that he did not understand or intend part of it: *Atkinson* v. *Morris* (1); *Fulton* v. *Andrew* (2); *Garnett-Botfield* v. *Garnett-Botfield* (3); *Brisco* v. *Baillie Hamilton* (4); *Gregson* v. *Taylor*. (5) We could not ask to have the whole residuary clause struck out; but if the Court finds that the general words "over which I shall then have a general power of appointment" bring in something which the testator did not intend, and that he would not have signed the will if he had understood that the words would bring that in, the Court can strike them out; and we submit that the evidence clearly proves those points.

But whether those words are struck out or not, the two letters proved in evidence are good soldiers' wills and revoke the former will so far as they are inconsistent with it. Colonel Beech was clearly "in actual military service"

(1) [1897] P. 40, 47, 49.
(2) (1875) L. R. 7 H. L. 448.
(3) [1901] P. 335.
(4) [1902] P. 234.
(5) [1917] P. 256.

BIBL. LONDIN UNIV.

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

within the meaning of the Wills Act, 1837 (1 Vict. c. 26), s. 11 : *In the Goods of Hiscock* (1) ; *Gattward* v. *Knee.* (2)

[*Hughes K.C.* It is not disputed that Colonel Beech was in a position to make a soldier's will.]

Then the first letter is a good will and it is confirmed by the second. A will need not be in any particular form so long as it shows the intention of the maker respecting the disposition of his property : see Jarman on Wills, 6th ed., vol. i., p. 33. That passage was approved by Lord Selborne in *Whyte* v. *Pollok.* (3) In *Dalrymple* v. *Campbell* (4) Horridge J. laid it down that it is not necessary for the validity of a soldier's will that he knew he was making a will. It is enough if he intended deliberately to give expression to his wishes as to the disposition of his property in the event of his death. That statement was approved by the Court of Appeal in *Godman* v. *Godman.* (5)

Hughes K.C. and *T. Bucknill* for the defendants. It is impossible to strike out a clause from a will which has been read over to and approved by the testator because one clause has an effect which the testator and his advisers had not expected. In *Guardhouse* v. *Blackburn* (6) Lord Penzance laid down the law very clearly ; and in his summing up to the jury in *Atter* v. *Atkinson* (7) he states the law in the same manner ; and his statement was adopted and followed by Hannen P. in *Harter* v. *Harter* (8) and *Morrell* v. *Morrell* (9) ; and these cases were followed by Jeune P. in *Collins* v. *Elstone.* (10)

Fulton v. *Andrew* (11) was a very singular case. There had been a verdict of a jury that the residuary clause had not been read over to the testator, and the only evidence of its having been read over was that of the residuary legatees, one of whom had prepared the will. Lord Cairns in his judgment speaks of fraud as an exception to the general

(1) [1901] P. 78.
(2) [1902] P. 99.
(3) (1882) 7 App. Cas. 400, 409.
(4) [1919] P. 7.
(5) [1920] P. 261.
(6) (1866) L. R. 1 P. & M. 109.
(7) (1869) L. R. 1 P. & M. 665.
(8) (1873) L. R. 3 P. & M. 11.
(9) (1882) 7 P. D. 68.
(10) [1893] P. 1.
(11) L. R. 7 H. L. 448.

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

rule that the will having been read over is conclusive; so that the case seems to have turned on fraud. No doubt the question is still left open whether the reading over has been a proper one, i.e., whether all the provisions of the will have been properly brought to the mind of the testator. But the presumption that if the will has been read over the testator has approved the whole of it, can only be displaced by the clearest evidence: see Hill J.'s judgment in *Gregson* v. *Taylor*. (1) The only case cited in which part of a will was struck out is *Brisco* v. *Baillie Hamilton* (2); and there it is clear that Jeune P. did not believe that the words struck out had ever been brought to the testator's knowledge.

Hawke K.C. in reply. I do not contend that the law since the decision in *Fulton* v. *Andrew* (3) is the same as it was at the time of the early cases cited against me. In the early cases the Court felt itself bound by the words. Since that decision it looks at the facts. The evidence is clear that the testator did not intend to divide his settled estates and would not have signed anything which he knew would have that effect.

As to the letters it is clear that they amount to a soldier's will. It is admitted that the testator was in a position to make such a will. It is not necessary for a soldier to make a formal will, any expression of what he wishes to become of his property is sufficient. That was stated by Horridge J. in *Dalrymple* v. *Campbell* (4); and it is only an application of the law stated in the passage cited from Jarman above, and laid down in Godolphin on Legacies (5) and in the case of *Bartholomew* v. *Henley* (6); and the statement of Horridge J. was adopted by the Court of Appeal in *Godman* v. *Godman*. (7) Duke P. has adopted the same view in an unreported case of *In re Blunt* (8) where the testator, who had made a will in favour of his fiancée, had married her and forgetting that his marriage revoked his will, had not made

(1) [1917] P. 256.
(2) [1902] P. 234.
(3) L. R. 7 H. L. 448.
(4) [1919] P. 7.
(5) The Orphan's Legacy, 3rd ed., p. 281.
(6) (1820) 3 Phillim. 317.
(7) [1920] P. 261.
(8) See note at end of this report.

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

a fresh one, but in a letter told her he had left her his property. The President admitted the letter to probate.

Hughes K.C. in reply on the new cases cited. The true principle is stated in Williams on Executors, 11th ed., pp. 79 et seq., where after stating the absence of necessity for a particular form in wide terms, the author states that there must be evidence that it was the intention of the writer to convey the benefits by the instrument which would be conveyed by it if it were a will. There was no such intention in these letters.

Durley Grazebrook and *Stafford Crossman* for the Public Trustee, and *Hon. Victor Russell* for the infant son of the plaintiff, merely submitted the case to the Court.

The defendant, Irene Beech (the other daughter of the testator), had put in a defence to the same effect, but was not represented at the hearing.

Cur. adv. vult.

July 31. SALTER J. Colonel Rowland John Beech died August 30, 1919, possessed of the Shawe and Brandon Estates in Warwickshire, which, under settlements made in 1885, stood limited to such uses as he should by deed or will appoint, and in default of and subject to such appointment, to his own use for life with remainders to his first and other sons in tail and remainders over. The testator had four children, two daughters and two sons. The eldest son was killed in 1915, leaving the plaintiff the only surviving son. In 1917, therefore, the position was that both estates would, on the death of Colonel Beech, become vested in the plaintiff, Captain Douglas Charles Murray Beech, unless Colonel Beech should appoint otherwise by deed or will. In 1917 Colonel Beech intended that, after his death, his eldest daughter, Mrs. Allen, should have the right to live at Shawe during her life and should have the sporting rights over the estate. But subject to these rights it is quite clear that when he made his will in 1917, and from that time until his death in 1919, Colonel Beech intended that both the Brandon and the Shawe Estates should, on his death, descend to his son under the

settlements, and he desired that his will should be so drawn as not to interfere with that operation of the settlements. He so instructed his solicitors. They, as they thought, carried out his instructions. Mr. Moore-Bayley, who drafted the will, still contends that it does carry out the instructions. Peterson J., however, on an originating summons, has declared that while the will does not execute the power of appointment over Shawe (which therefore went to the plaintiff under the settlement) yet that, by virtue of the Wills Act, 1837, s. 27, the residuary devise is an exercise of the power over Brandon. The plaintiff, therefore, instead of getting the whole of Brandon under the settlement, gets half only under the will. This decision, so far as it relates to Brandon, is under appeal. Meantime the plaintiff brings this action, claiming that the probate of this will should be revoked and probate be granted with the omission of certain words, so as to bring the text of the will into accordance with the intentions of the testator. His case is that if Peterson J. is right, the testator did not know and approve the contents of the will, but that if the Court of Appeal should differ from that learned judge, then the testator did know and approve the contents of his will. If this contention is well founded, it seems to me that any future decision of the Court of construction may be fettered by an application in this Court to revoke probate and grant it of the will in an altered form, at any rate in all cases where the necessary alteration can be effected by the omission of words. The contention is that if a will does not have the effect intended, the testator cannot be said to have known and approved its contents. I think this contention is fallacious, and based on a confusion between the terms and the effect of the document. A testator cannot give a conditional approval of the words which have been put into his intended will by himself, or by others for him. He cannot say: "I approve these words if they shall be held to bear the meaning and have the effect which I desire, but if not I do not approve them." He must find, or employ others to find, apt words to express his meaning; and if, knowing the words intended to be used, he approves them

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

Salter J.

and executes the will, then he knows and approves the contents of his will, and all the contents, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and legal effect: *Morrell* v. *Morrell.* (1)

I do not rely on any rule that a testator who reads his proposed will and then executes it, must be deemed to approve the contents. I am satisfied that Colonel Beech in fact read the terms of his proposed will with due care. He was an educated and experienced man, accustomed to the transaction of business and the management of property. He had made many wills and was obviously interested in the posthumous disposition of his property. He found a small matter in the will as engrossed which did not meet his wishes and caused an alteration to be made. He knew the contents of his will. As to approval, he did in fact approve the whole of the contents. He did so because he was advised and believed that a will in those terms would have the effect he desired, and he relied on his solicitors. The instrument of July 23, 1917, is testamentary in character; the testator was of testamentary capacity; he knew and approved the contents of his will; he duly executed it; and it has never, as I think, been revoked or varied except by the codicil of February 4, 1918. It is, therefore, the testator's last will, and was, together with the codicil of February 4, 1918, rightly admitted to probate.

There is, I think, another ground on which I am bound to refuse to grant probate of this will with certain words omitted. The words sought to be omitted occur in the residuary devise and are "or over which I shall then have a general power of appointment by will." The omission of these words would not alter the effect of the will. Such omission could not bring the will into accord, or more nearly into accord, with the intention of the testator. No omission of words from this will could bring it into such accord unless the residuary devise were omitted altogether, a course which is not, and could not be, suggested.

(1) 7 P. D. 68, 70, 72, 75.

The second question I have to decide arises on two letters which were written by Colonel Beech to the plaintiff in March, 1918. The first letter was written on or about the 16th of that month and has been lost. It contained a passage which in the recollection of the plaintiff was in substance as follows: "I daresay you would like to know that I have left you after me both the Brandon and the Shawe Estates, also the London house." The plaintiff's wife remembered this passage as having run: "I am leaving you." I think the meaning is the same. I am satisfied that Colonel Beech informed his son that he had made a will under which the son would succeed to the three properties. The second letter has been preserved and is dated March 23, 1918. It is a mere correction of the first. It contains the following passage: "When I told you about Shawe going to you after me I should have also said that Kitty will be able to use the house if she wishes during her lifetime, she paying the house rates. I take it Brandon will be sufficient for a residence for you and Clare" (the son's wife). When these letters were written Colonel Beech was entitled to the privileges attaching to soldiers' wills.

Reliance was placed on the observation of Lord Selborne in *Whyte* v. *Pollok* (1) where he approves in principle the following passage from Jarman on Wills, vol. i., p. 33, 6th ed.: "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded."

I was also referred to the judgments of Horridge J. in *Dalrymple* v. *Campbell* (2) and *Godman* v. *Godman*. (3) It will be enough to quote the following passage from the judgment

(1) 7 App. Cas. 400, 409. (2) [1919] P. 7, 9.
(3) [1919] P. 229, 233.

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

Salter J.

in the latter case: "I think the true test is the one which I laid down in *Dalrymple* v. *Campbell*." (1) There I said: "In my view it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew he was making a will, or had the power to make a will by word of mouth. The statement made by the deceased man must, I think, be meant for a will, only in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death." I agree with this statement, which would in any case be binding upon me, since it was approved by the Court of Appeal. (2)

On these passages it was argued that these letters disclose the intention of the writer respecting the posthumous destination of his property, and are therefore wills or a will. But Mr. Jarman did not say, nor did Horridge J., that every statement which "discloses the intention of the maker respecting the posthumous destination of his property" is of necessity a will. I agree that these letters disclose the writer's intention respecting the posthumous destination of part of his property. But the words disclosing such intention must, in order to constitute a will, be a testamentary act.

The case is shortly stated by Sir H. Jenner Fust in *Coventry* v. *Williams* (3): "I apprehend it to be incumbent on a party setting up a paper as testamentary, to show, by the contents of the paper itself, or by extrinsic evidence, that it is of that character and nature; that by the very identical paper the party deceased has given, or intended to give, or supposed himself to have given, the particular legacy or bounty claimed."

In *Whyte* v. *Pollok* (4) Lord Selborne, dealing with the essentials of a will, begins his judgment as follows: "In the first place I lay it down that it is, in my judgment, a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator. Of course it might happen that something which

(1) [1919] P. 7, 9.
(2) [1920] P. 261.
(3) (1844) 3 Curt. 787, 790.
(4) 7 App. Cas. 400, 405.

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

Salter J.

he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part; but, either at the time when the act was originally done or at some other time, he must, in a sufficient way, manifest his purpose that it should be a testamentary act."

I think that, in order to constitute a will, the words used by a testator must be intended by him, at or after the time he uses them, to be preserved or remembered so as to form the guide to those who survive in carrying out his wishes.

In my opinion these letters are not testamentary in character or intention. They are merely a statement, and an inaccurate statement, of the legal effects of an existing will. If these letters are codicils they partly revoke the will. It seems to me they show a contrary intention, an intention to approve and affirm the will.

There is, I apprehend, no difference in substance between the will of a soldier on active service and the will of a civilian. No words which are not testamentary in character and intention, can constitute a soldier's will. These letters are, therefore, not entitled to probate. The plaintiff fails on both points and the action must be dismissed.

I pronounce in solemn form for will and codicil. Costs of all parties out of the estate.

NOTE.

PROBATE.

1920

Oct. 18.

In re H. E. BLUNT (DECEASED).

MOTION.

Harold Ernest Blunt, who was living in China and employed in a bank there, came to England on leave in 1914, and on the outbreak of the war he joined the Sussex Yeomanry, and early in 1915 obtained his commission. On December 2, 1915, he made a will leaving his residuary estate to Miss K. H. Blunt, his cousin and fiancée. On December 30, 1915, he went with his regiment to Egypt and Palestine. In May, 1918, he went with his regiment from Palestine to France. In July, 1918, he came home on leave, and on July 20, 1918, married Miss K. H. Blunt at Windsor. He appears not to have known that his marriage revoked his will. On July 25 he said to his wife: "I want to tell you about my affairs and what there will be for you if anything happens to me. You are to be sure and get all the money owing to me by the Hong Kong and Shanghai Bank and the Provident Fund at that Bank and the securities deposited there and the shares in the Belgian

1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

Railway. With one thing and another you will be all right. If there should be a child insure for its education. If not I should suggest that you adopt a child." He rejoined his regiment on August 31, 1918, and died in a military hospital in Belgium on February 16, 1919. The personal property mentioned above amounted to a little over 3183*l.* The deceased left no real estate and no other personal estate except 93*l.* on current account with Cox & Co. The next of kin of the deceased were a sister of his father, and a sister and three brothers of his mother. There was no child. The widow applied by motion for a grant of administration with the nuncupative will set out above annexed.

H. D. Grazebrook for the motion.

Noel Middleton for next of kin on the mother's side.

The father's sister consented to the motion.

All parties consented to the case being decided on motion.

THE PRESIDENT (SIR HENRY DUKE) granted administration to the widow with the nuncupative will annexed.

Solicitors for applicant: *Haslewood, Hare & Co., for Percy Maylam, Canterbury.*

Solicitors for next of kin: *Carleton-Holmes, Fell & Wade, for Nockolds & Sons, Bishop's Stortford.*

J. R. B.

The plaintiff appealed against the refusal of the learned judge to admit the letters to probate.

The appeal was heard on November 14 and 15, 1922.

Maugham K.C. and *Noel Middleton* for the appellant. These letters constitute a statement of the testator's final intention as to the disposition of his property and ought to be admitted to probate as a soldier's will. They are a confirmation of what the testator believed he had done by his formal will. The Court regards the question of soldiers' wills with some leniency. It is true that in order to be admitted to probate the document or conversation must be a testamentary act, but that means testamentary in the sense of a soldier's will. What was laid down by Lord Selborne in *Whyte* v. *Pollok* (1) is satisfied if what the testator says or writes is an expression, however informal, of his wishes as to the disposition of his property, and that is so in the present case: *Dalrymple* v. *Campbell* (2); *Godman* v. *Godman* (3); where the authorities are fully discussed by

(1) 7 App. Cas. 400, 405. (2) [1919] P. 7.
(3) [1920] P. 261.

Scrutton L.J. The documents need not be testamentary in the sense that the testator realized that he was making a will. Where a soldier on service writes instructions to his solicitor as to the disposition of his property those instructions may be regarded as his will, and where he writes home a statement of what he believes he has done by his will, and that represents his final intention, it may be admitted to probate. It is not necessary to show that the letter was intended to make any alteration in his will, it is sufficient if it be the expression of his fixed and final intention as to the disposition of his property. The declaration of the testator need not be made animo testandi at a time when he thought that his words or his writing would be his will.

[They also referred to *Constable* v. *Steibel* (1); *Drummond* v. *Parish* (2); and *Wood* v. *Gossage.* (3)]

Hughes K.C. and *T. Bucknill* for the respondents,

Hon. Victor Russell for the infant son of the appellant, and *Stafford Crossman* for the Public Trustee, were not called upon to argue.

LORD STERNDALE M.R. This is an appeal from a decision of Salter J. sitting in the Probate, Divorce and Admiralty Division. He decided two points. There is no appeal upon the first, but the second point on which there is an appeal is this. He decided that two documents, or, rather, one document, with the proved contents of another, ought not to be admitted to probate as a soldier's will of the testator. I think he was right.

The will of a soldier on active service is not subject to the same restrictions as the wills of other persons. That is a matter which, until quite the last few years, has not received much consideration from the Courts because such cases have not often arisen, for reasons which I mentioned in my judgment in *Godman* v. *Godman.* (4) But of late years, during the recent war, a very considerable number of cases with regard to soldiers' wills have arisen. In my opinion, which I have

(1) (1827) 1 Hagg. Eccl. 56.
(2) (1843) 3 Curt. 522, 531 et seq.
(3) [1921] P. 194.
(4) [1920] P. 261.

C. A. 1922

BEECH, *In the Estate of* BEECH *v.* PUBLIC TRUSTEE.

Lord Sterndale M.R.

expressed before, and I see no reason to depart from it, a soldier's will now is in the same position as the will of a civilian before the Statute of Frauds was passed. It may be, as I have already said, that sometimes the Courts have been inclined, from sympathy I dare say, to treat the question of whether a document or a conversation said to be a soldier's will should be admitted to probate with greater leniency than that with which such matters are treated in the case of a civilian. But in my opinion there is no difference in principle between the two. We have been referred to a great number of cases which I do not propose to discuss, because they were very admirably and exhaustively discussed by Scrutton L.J. in his judgment in *Godman* v. *Godman* (1), and I do not think it is necessary to repeat that discussion. I think that the principle may be taken, as Salter J. said, from the words of Lord Selborne in the House of Lords in *Whyte* v. *Pollok* (2), where he said: "In the first place I lay it down that it is, in my judgment, a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator. Of course it might happen that something which he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part; but, either at the time when the act was originally done or at some other time, he must, in a sufficient way, manifest his purpose that it should be a testamentary act." I think that is, although it is not for me to say so, a perfectly correct statement of the law, because it carries this explanation, that by a testamentary act Lord Selborne did not mean a document executed with the formalities of a will; he did not even mean a document, or a statement which the person writing or making it thought was a will. It would satisfy the words of Lord Selborne if what the testator said, or wrote, was an expression of his wishes as to the disposition of his property, that is to say, an expression of his wishes as to what was to be done after his death with his property; but it must be

(1) (1920) P. 261. (2) 7 App. Cas. 400, 405.

that. A document or a conversation which is such that it only speculates on the wishes of the person making the statement, or writing the document, is not sufficient. It must be something which is, in however informal a manner, an expression of his wishes as to the disposition of his property. We have to apply that principle to these documents, and the documents are these. The testator had made a will, about which I say nothing except that it was a will made in the ordinary way, containing certain dispositions of his property, and especially of two landed estates which he possessed, called Shawe and Brandon. As to what those dispositions were I say nothing, because they are the subject of another appeal. But they were full and exhaustive dispositions. On March 16, 1918, some time after the will had been made, the testator being on active service in France —and we know March 16 was about the time when operations in France were very critical and severe—wrote a letter. The letter has, unfortunately, been lost. We do not know how, but there is evidence of the son to whom it was written, and of the son's wife, as to its contents. Their statements do not differ in substance, although they do a little in words. The one that has been adopted is in these terms: "I dare say you would like to know that I have left you, after me, both the Brandon and the Shawe Estates, also the London house." The second letter is dated March 23, a week afterwards: "My dear Douglas, we are in the midst of a most tremendous battle"—I need not read the rest of that; it only describes the condition of things existing at that time in France. It goes on: "When I told you about Shawe going to you after me I should have also said that Kitty will be able to use the house if she wishes during her lifetime, she paying the house rate. I take it Brandon will be sufficient for a residence for you and Clare"—the son's wife.

The only question for us to consider is: are those documents one or either, or both of them, expressions of the testator's wishes as to what was to be done with his property? Were they documents by which he meant to express a wish as to the way in which his property should go after his death?

C. A. 1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

Lord Sterndale M.R.

It seems to me that they are not. They are only statements of what he says he has done, and no doubt in saying what he has done he is referring to his will. Now upon a construction that has been put upon that will they are, so far as they say that the son is to have the Brandon and the Shawe Estates after the testator's death, inconsistent with the will. According to one construction of the will the son would only get much less than the fee simple of the property. With regard to the second letter, where he says at the end of it: "When I told you about Shawe going to you after me I should have also said that Kitty will be able to use the house if she wishes during her lifetime, she paying the house rate" is also inconsistent with the will. Under the will the lady who is called Kitty there was to have not only the house, but she was to have the sporting rights, and there was provision as to her paying a certain part of the taxes as well as the rates. I can see no indication there that the testator in any way intended to alter the provision that he had made for this daughter whom he calls Kitty. This document, if it be testamentary, is inconsistent with the will inasmuch as it gives her less. I think that the letters are simply statements, possibly erroneous, of the disposition that he had made, and in no way contain an intimation of his wishes as to the disposition of his property. If he had been asked: "Now those things are inconsistent with your will; do you wish your will to be altered?" I cannot say what he would have said; I do not know. But there is on the face of those documents, to my mind, no intimation whatever that he is expressing a wish or intention as to the destination and disposition of his property. He is merely saying: "That is what I have done, and I think you would like to hear it." I cannot do better than repeat the words of Salter J.: "I think that in order to constitute a will the words used by the testator must be intended by him, at or after the time he uses them, to be preserved or remembered so as to form a guide to those who survive in carrying out his wishes. In my opinion these letters are not testamentary in character or intention"—and these are particularly

the words I mean—"they are merely a statement, and an inaccurate statement, of the legal effect of an existing will. If these letters are codicils they partly revoke the will. It seems to me they show a contrary intention, an intention to approve and affirm the will." Those words, to my mind, quite correctly describe these documents. I ought to say also that the testator returned from active service in April, 1918. He had, about a year or more after that, some further conversation with regard to his will. He did not die until August, 1919, considerably more than a year after he came back from active service, and he did nothing whatever to carry out any intention which it is said he expressed by these documents. That does not tend to show that he changed his mind, but it does tend to show that in what he wrote in these letters he had no intention of making a future disposition, or expressing any wishes as to the future disposition of his property; but he merely intended to make a statement as to what he had done. I think that is Salter J.'s view, and that it is perfectly right. I think the appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. The question to be determined is whether the two documents, probate of which is sought by the appellants, are testamentary documents. In determining that we have to consider, as was said by Lord Selborne in *Whyte* v. *Pollok* (1), whether the testator has manifested in a sufficient way that in performing the act of signing them he was purposing to perform a testamentary act. Now a testamentary act seems to me to be one which falls under one or other of the following categories. First, it may be a fresh disposition of property; secondly, it may be a mere confirmation of what had been originally effected, or intended to be effected, by a previous testamentary disposition; thirdly it may be a revocation, without any new disposition of property, of a previous effective disposition; or, fourthly, it may be a combination of acts falling under these categories, or any of them. But in my judgment a

(1) 7 App. Cas. 400.

C. A. 1922

BEECH, *In the Estate of.* BEECH v. PUBLIC TRUSTEE.

Warrington L.J.

document, or in the case of a nuncupative will, a conversation which only refers to, and does not purport to alter, revoke, add to, or confirm, a previous effective disposition cannot be of a testamentary character.

I now turn to the letters themselves to see what they really are. It must be borne in mind that at the time the letters were written there was in existence a will signed a little more than a year previously dealing with the three properties, Shawe, Brandon, and No. 71 Cadogan Square. There was also in existence a formal codicil to that will, not, it is true, dealing with those properties, but still a codicil to that will, and that codicil is dated so recently as February 4, 1918. The first of the two letters was written about March 16, 1918. That letter is addressed to the testator's son Douglas, and says: "I daresay you would like to know that I have left you after me both the Brandon and the Shawe Estates and also the London house." There is no question that that statement was accurate with regard to the London house. There is a question on the construction of the will whether it is accurate as regards the Brandon and the Shawe Estates, or one of them. It has been decided already in the Court of construction, but that decision is under appeal, that it was accurate with regard to Shawe but that it was not accurate with regard to Brandon. That is a question on the construction of the will. But it may well be that the testator thought that the disposition which he had really made by the will is the one which he refers to in this letter. Whether that was so or not, when the terms of the letter are looked at it appears to me that that letter, at all events, is plainly only a statement of what he had done, and not either a fresh disposition of any of the three items of property, or a confirmation of something which he had previously done, and which he had some reason to believe might possibly be defective. If you turn to the second letter I think that that view is strongly confirmed. The only material part of it is the passage: "When I told you about Shawe going to you after me I should have also said that Kitty will be able to use the house if she wishes during

her lifetime, she paying the house rate. I take it Brandon will be sufficient for a residence for you and Clare." When we look at that letter in the light of what he had actually done it becomes abundantly clear that he is referring in a summary, and, because it is summary, an incorrect and incomplete manner to certain provisions in the will which he had made for the occupation by his daughter Christabel of Shawe House, and of the shooting and some other benefits connected with the house. But, again, it is obviously, I think, not intended to be a disposition of Shawe House in favour of his daughter Christabel; for, if so, it would have been entirely incomplete, and narrower than the provision he had made by his will. I think he is referring, as I say, in a summary way, to what he had done in greater detail in the will. So, again, the reference to Brandon is no indication that he intended by that letter to give Brandon to his son. It is merely an expression of his expectation that Brandon having, as he had been told in the first letter, been left to him after the testator's death would be a sufficient residence for him and his wife, and, I suppose, as a sort of justification for the provision which the testator had made for his daughter Christabel out of his interest in Shawe House.

On the whole, I have come to the conclusion that the judgment of Salter J. is correct and that neither of these two letters can be treated as testamentary, and they are therefore rightly excluded from probate.

YOUNGER L.J. I am of the same opinion. At the date when these letters were written the testator had executed a formal will on February 23, 1917, and an equally formal codicil on February 4, 1918. The codicil was executed while he was on active service. Having regard to its attestation, it was probably executed during one of his visits to London during the period of his active service. But it was executed during that period, because we are told by an official of the War Office that the testator returned from active service on April 6, 1918. The position therefore was that having gone to France, I think, on February 24, 1917, his formal will was

C. A. 1922

BEECH, *In the Estate of.* BEECH *v.* PUBLIC TRUSTEE.

Younger L.J.

made on the eve of his departure. The codicil was executed while he was still, so far as the War Office was concerned, on active service in France, and these letters were written shortly after that codicil had been made. From that I draw this inference, that the letters were not written, nor were they prompted by any difficulty in which the testator found himself by reason of his military service. If one might guess from the terms of the letters themselves, one, I think, might arrive at this possibly accurate conclusion, that they were written with a view of relieving any anxiety his son might feel with regard to his own position, as he at that moment was on active service in Palestine. But be that as it may, the letters were not resorted to from any difficulty caused by the testator's military service. That had not prevented him executing a formal codicil in which he expressly confirmed his will a little more than a month before the first letter was written. Nor, again, when one looks at the letters, does it appear that the testator was asking, for instance, that his will might be sent to him in order that he might see whether it correctly represented his views or wishes with reference to the matters that he refers to in his letters. Had the letters taken that form one can understand that they might have been regarded as the equivalent of instructions for a new will; they would be valid as a soldier's will as indicating testamentary intent, even although no further will was executed. But that is not the effect of the letters. Their effect is nothing more than a statement, inaccurate if you like, of the effect of the will which he had, in point of fact, executed, with no intention, so far as one can judge from their terms, that the will as executed should in any way thereby be altered, or should have any effect, so far as construction was concerned, other than would have been attributed to it, had these letters never been written at all. That that is so is, in my judgment, shown very clearly by the second letter, the only document under the hand of the testator that is extant, because, as counsel very candidly agreed, it is not possible to contend that the statement made in that letter with reference to the

disposition which the testator had made by his will of a life interest in Shawe House or Estate in favour of his daughter could be regarded as intended to supersede the precise directions which, with reference to that matter, are contained in his will, and which are not correctly reproduced in the letter. Accordingly I arrive at the same clear conclusion at which the learned judge arrived—namely, that these letters manifest no intention on the part of their writer that anything contained in his testamentary dispositions already formally executed by him under competent advice was to be affected by anything contained in both, or either, of the letters. I think they are not admissible to probate.

Appeal dismissed.

Solicitors for plaintiff: *William Sturges & Co.*

Solicitors for Public Trustee: *Finch, Jennings & Tree, for Moore-Bayley & Co., Birmingham.*

Solicitors for defendants Mrs. Christabel Allen and Auriol Allen, her infant child: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for defendant Rowland James Beech, the infant son of the plaintiff: *Thicknesse & Hull.*

Solicitor for defendant Irene Beech: *William Cecil Harris.*

[The appeal from the decision of Peterson J. came on for hearing on November 15, 1922, when the Court reversed his decision upon the above-mentioned summons, and held that the residuary gift in the will did not operate as an exercise of the testator's general power of appointment over either the Brandon or the Shawe Estate, so that both passed to the plaintiff as tenant in tail.]

G. A. S.

1922
Dec. 6.
1923
Jan. 15.

ADMIRALTY.

THE AMBATIELOS; THE CEPHALONIA.

Shipping—Pilotage Dues—Action in Rem—Jurisdiction—Summary Procedure—Pilotage Act, 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 49.

The High Court of Admiralty and its successor, the present Admiralty Division of the High Court of Justice, have always had jurisdiction to entertain an action in rem for pilotage dues, and the pilot is not restricted to his right under s. 49 of the Pilotage Act, 1913, of taking proceedings in a Court of summary jurisdiction:—

Sed quaere whether there is a maritime lien in respect of pilotage dues.

ACTIONS in rem (heard together) by pilots against the owners of two Greek vessels, the *Ambatielos* and the *Cephalonia*, for the sums of 21*l.* 17*s.* 6*d.* and 42*l.* 17*s.* 6*d.* respectively in respect of piloting the vessels from Barry Roads to dock at Cardiff in October, 1921.

The vessels were under arrest in a mortgagee's action, and the only defence put in was that the Court had no jurisdiction to entertain the actions.

Dumas for the plaintiffs. A pilot, except for services contracted for and rendered in the body of a county, has a right to sue in rem and has a maritime lien for his unpaid pilotage dues. He has the same rights as those of other mariners except the master: *Ross* v. *Walker* (1); see also *The Prince George* (2), where Sir John Nicholl adopted the statement of Ryder C.J. in *Mills* v. *Long* (3), that "upon considering all the cases we are of opinion that the privilege of suing in the Court of Admiralty for wages does extend to every person employed on board a ship except the master."

[HILL J. Is a pilot's remuneration "wages"?]

"Wages" has a very wide meaning—e.g., "The wages of sin is death." It has never been suggested that a pilot has no right to sue in rem: see Coote's Admiralty Practice (1868), p. 136, where it is stated that pilotage and towage rank in

(1) (1765) 2 Wils. 264. (2) (1837) 3 Hagg. Adm. 376.
(3) (1754) Say. 136.

the same category as wages and confer a maritime lien; see also Maude and Pollock's Merchant Shipping, 4th ed., p. 86, to the like effect. Although the statement that towage confers a maritime lien is erroneous (*Westrup* v. *Great Yarmouth Steam Carrying Co.* (1)), the mistake is easily accounted for, as in the old days before there were steamships towage cases would all have been in the nature of salvage.

In *The Adah* (2), although the extra remuneration claimed by the pilot was refused, no objection was taken to the jurisdiction in rem; and in *The Dowthorpe* (3) Dr. Lushington treated pilotage as being on the same footing as wages. In *The Servia* and *The Carinthia* (4) Barnes J. entertained an action for extra remuneration on behalf of a pilot, but the reports do not state whether the proceedings were in rem or in personam. It is immaterial that the definition of "seaman" in s. 742 of the Merchant Shipping Act, 1894, excludes a pilot; the plaintiffs are not suing under the Merchant Shipping Act, but base their claim on the ancient jurisdiction of the Court of Admiralty.

The effect of s. 49 of the Pilotage Act, 1913, coupled with s. 681 (ii.) of the Merchant Shipping Act, 1894, is to give pilots the right to recover pilotage dues before a Court of summary jurisdiction, but there is nothing in s. 49 to lead to the conclusion that thereby the ancient jurisdiction of the Admiralty Court is taken away.

Carpmael for the defendants. The old pilotage Acts of George III. and George IV. gave pilots summary remedies, and it is significant that neither the Admiralty Court Act of 1840 nor the extended Act of 1861 make any mention of pilots, particularly as s. 10 of the Act of 1861 expressly extended the rights of seamen. In the Merchant Shipping Act, 1854, which first combined the provisions as to seamen and pilots in one statute, the provisions are kept entirely distinct and different remedies are given. Both were given remedies in a Court of summary jurisdiction, but the seaman could only sue in the Admiralty Court under certain

(1) (1889) 43 Ch. D. 241.
(2) (1830) 2 Hagg. Adm. 326.
(3) (1843) 2 W. Rob. 73.
(4) [1898] P. 36.

1922

THE AMBATIELOS; THE CEPHALONIA.

circumstances, as, e.g., when the claim was over 50*l.* or the ship was already under arrest. It would seem to follow that it was never contemplated that pilots had a right of action in the Admiralty Court at all. Clearly it has not been the policy of the Legislature to class pilots with seamen, as the definition of seaman in the Merchant Shipping Acts excludes pilots. They are given very full remedies under the Pilotage Act, 1913, whereby they can recover their dues by summary procedure even against consignees or their agents. If pilots have no right of action in rem, a fortiori they have no maritime lien. If the Court has no jurisdiction to entertain the actions it is immaterial that unconditional appearances to the writs were entered: *Joseph Crosfield & Sons* v. *Manchester Ship Canal Co.* (1)

Dumas in reply. If the pilotage was in respect of services in the body of a county the pilot would have to proceed under s. 49. It was therefore necessary to give a remedy to provide for such cases.

Cur. adv. vult.

1923. Jan. 15. HILL J. read the following judgment: In each of these cases a pilot, duly licensed by the Cardiff Pilotage Board, brings an action in rem claiming the amount of the authorized dues for piloting the ship from Barry Roads to dock at Cardiff. At the date of the writ, each ship was under arrest in a mortgagee's action. The ships are Greek. The Greek owner entered an appearance, not under protest. The only defence raised at the hearing was that no action by a pilot is sustainable in this Court, whether in rem or in personam, the contention being that the remedy by summary proceedings under s. 49 of the Pilotage Act, 1913, is the only remedy.

I have examined the authorities and the Pilotage Act and the Acts which preceded it. I have come to the conclusion that the High Court of Admiralty and its successor, the Admiralty Division of the High Court of Justice, have always entertained actions in rem for pilotage remuneration

(1) [1904] 2 Ch. 123.

and that there is nothing in the statutes which has taken away that jurisdiction. A judgment in rem can therefore be pronounced. A fortiori there is nothing to take away jurisdiction in personam, and, the defendants having appeared, a judgment in personam can be pronounced. It is clear that the High Court of Admiralty entertained suits for pilotage remuneration and treated the pilot as a seaman and his remuneration as wages. It is also clear that the Courts of common law, at a time when they were most jealous of Admiralty jurisdiction, recognized this jurisdiction of the High Court of Admiralty except in cases where the contract was made and the work done within the body of a county. It is unnecessary to go further back than *Ross* v. *Walker*. (1) That was a motion for a prohibition in a suit described as "a pilot's suit for wages in Admiralty." The Court of Common Pleas granted prohibition because the contract was made on land and was to do work on board within the body of a county (the pilotage was Sea Reach to Deptford), but in the judgment it was said: "It is established that every officer and common man who assists in navigating the ship (except the master) . . . . is a mariner, and may sue for wages in the Court of Admiralty." Suits by pilots for remuneration were heard without objection by Sir William Scott in *The Nelson* (2) and *The Bee*. (3) A similar suit for conducting an American ship from the Downs to Flushing was dismissed on the ground that the service was illegal as involving trading with the enemy, but there was no suggestion that the High Court of Admiralty had not jurisdiction: *The Benjamin Franklin*. (4) In 1830 in *The Adah* (5) Sir Christopher Robinson heard a similar suit without objection. Dr. Lushington admitted similar claims in *The Dowthorpe* (6) and *La Constancia* (7), and treated pilotage as on the same footing as wages. In the latter case he treated pilotage, as also towage, as giving maritime liens. He was wrong in thinking

(1) 2 Wils. 264, 265.
(2) (1805) 6 C. Rob. 227.
(3) (1822) 2 Dods. 498.
(4) (1806) 6 C. Rob. 350.
(5) 2 Hagg. Adm. 326.
(6) 2 W. Rob. 73.
(7) (1846) 4 N. of C. 512.

1923

THE AMBATIELOS; THE CEPHALONIA.

Hill J.

that towage carried a maritime lien: see *Westrup* v. *Great Yarmouth Steam Carrying Co.* (1) He was right in thinking that there was a right in rem for towage whether there was or was not such a right before the Act of 1840, for towage is mentioned in that Act. Wages and pilotage were not mentioned in that Act, and Dr. Lushington was therefore exercising a jurisdiction which did not depend upon statute.

Coming to more modern times, a suit for pilotage remuneration was heard without objection in *The Clan Grant* (2), and in a note on p. 201 of the third edition of Williams and Bruce's Admiralty Practice there is a reference to *The Limerick.* (3) These cases are subsequent to the Admiralty Court Act, 1861, which by s. 10 provided that "the High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise. . . . ." I incline to think that "seaman" and "wages" as used in that section include pilot and a pilot's remuneration. The original jurisdiction was based on so treating a pilot and his remuneration. It is nothing to the point that the Merchant Shipping Act, 1854, and its successors define seaman so as to exclude pilot. The question is in what sense was "seaman" used in the Admiralty Court Act, 1861. The Courts have treated it as used in the wide sense in which it was used in the eighteenth and early nineteenth century when dealing with the words "any claim for wages" in the County Courts Admiralty Jurisdiction Act, 1868. In *Reg.* v. *Judge of City of London Court and Owners of S.S. Michigan* (4) Wills J., after consulting Butt J., said: "The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation"; and in *The Ruby* (No. 2) (5) Sir Francis Jeune, with reference to s. 10 of the Act of 1861, said: "I agree that the word 'seaman' may be extended to any person who is employed

(1) 43 Ch. D. 241.
(2) (1887) 6 Asp. M. L. C. 144.
(3) Unreported. Nov. 23, 1875.
(4) (1890) 25 Q. B. D. 339, 342.
(5) [1898] P. 59, 62.

in the practical employment or management of a ship; but the gist of the matter is that the employment must be to do the work of the ship." But whether s. 10 includes a pilot or not, the jurisdiction in respect of a pilot's claim was not questioned in *The Clan Grant*. (1) That implies that if a pilot's claim was not within s. 10 then it was within the original jurisdiction of the Court. Further, in the third edition of Williams and Bruce at p. 201 it is stated that: "By the ancient practice of the Court of Admiralty the privilege of suing in the Court extended to every person other than the master employed on board a ship: to the mate, to a surgeon, to a pilot, unless the contract was made and the work done infra corpus comitatus, to a purser, to a ship's carpenter, to a boatswain, to a female acting as cook and steward, and to an apprentice. The word 'seaman' when used in the Admiralty Court Act, 1861, thus appears to include every person other than the master who may have a claim for wages." And at p. 669 are given forms of a writ and warrant of arrest in a pilotage action and a form of Statement of Claim taken from *The Clan Grant* (1), and there is a note, "Suits for pilotage are of rare occurrence," and a further note to the Statement of Claim: "This form was drawn whilst the Merchant Shipping Act, 1854, was in force. It can easily be altered to suit a case under the Act of 1894."

But it is said that s. 49 of the Pilotage Act, 1913, gives the pilot his remedy and his only remedy. Let us examine the statutes. At the date of *The Bee* (1822) (2) the pilotage Act in question was 52 Geo. 3, c. 39. By ss. 57 and 58 together with ss. 71 and 72, pilotage rates were made recoverable, according to the amount involved, either before justices or before any of the Courts of Record at Westminster; s. 73 provided that nothing in the Act should impair the jurisdiction of the High Court of Admiralty. At the date of *The Adah* (1830) (3) the pilotage Act in question was 6 Geo. 4, c. 125. Sects. 44 and 45 together with ss. 76 and 77 gave remedies summary or otherwise, according to the amount

(1) 6 Asp. M. L. C. 144. (2) 2 Dods. 498.
(3) 2 Hagg. Adm. 326.

1923

THE AMBATIELOS; THE CEPHALONIA.

Hill J.

involved, similar to the remedies given by 52 Geo. 3, c. 39. Sect. 87 provided that nothing in the Act should impair the jurisdiction of the High Court of Admiralty. It will be observed that both these statutes recognized that the High Court of Admiralty had a jurisdiction in matters of pilots. But the saving clauses leave it open to contend that, without them, the remedies provided would have ousted the jurisdiction of the High Court of Admiralty. The Merchant Shipping Act of 1854 by ss. 363 and 364 gave a qualified pilot a summary remedy for pilotage dues. It was held in *Morteo* v. *Julian* (1) that this right did not extend to the allowances under s. 357 of the Act of 1854 to a pilot taken out of his district. The Merchant Shipping Act, 1894, by s. 591 re-enacted ss. 363 and 364. Sect. 49 of the Pilotage Act, 1913, re-enacts s. 591, substituting "licensed pilot" for "qualified pilot," and by s. 34 extends the summary remedy to allowances to a pilot taken out of his district. If s. 49 of the Act of 1913 provides the only remedy, then the corresponding sections of the Merchant Shipping Acts of 1854 and 1894 provided the only remedy; *The Clan Grant* (2) and *The Limerick* (3) ought never to have been heard, and the passages cited from Williams and Bruce are wrong. I see no sufficient reason why they should be held to provide the only remedy. It is to be observed that the Acts of 1854 and 1894, which define a seaman so as to exclude pilot and provide a summary remedy for seamen's wages, in terms provide that a proceeding for recovery of wages not exceeding 50*l.* shall not be instituted in any superior Court of Record nor in any Court having Admiralty jurisdiction except in certain cases: see ss. 188 and 189 of the Act of 1854 corresponding with ss. 164 and 165 of 1894. The same Acts give a summary remedy to a qualified pilot, but contain no section corresponding to s. 189 of the Act of 1854 and s. 165 of the Act of 1894, prohibiting proceedings in superior Courts of Record. Further, if s. 49 of the Pilotage Act does provide the only remedy, it would produce anomalous results. It

(1) (1879) 4 C. P. D. 216. (2) 6 Asp. M. L. C. 144.
(3) Unreported.

applies only to licensed pilots suing for pilotage dues (including allowances when taken out of the district). Pilotage in districts where no licence is necessary would still be within the jurisdiction of the Court; claims for pilotage abroad or cases of pilotage to which no dues were applicable also would still remain within the jurisdiction; while the very men whom the statute sets out to protect would be left to their summary procedure. Moreover, while the Merchant Shipping Act would have permitted claims of small amount by seamen (exclusive of pilots) to be brought in this Court when the ship was under arrest, a pilot would have no such right.

I hold that a pilot claiming pilotage remuneration has a right in rem and can sue in this Court. In general, he will be ill-advised to sue when he has a summary remedy, for he is not likely to be given costs if he neglects the cheaper and pursues the more expensive remedy. But in cases where the ship is already under arrest, and especially when the ship is foreign owned, it may be a proper thing to sue in this Court. In the present case I hold that it was, and I give judgment for the plaintiffs with costs. I am not deciding that there is a maritime lien for pilotage dues. It does not necessarily follow because there was original jurisdiction in the High Court of Admiralty in respect of pilotage that there was a maritime lien for pilotage: see the judgments of Lords Bramwell and FitzGerald in *The Henrich Björn.* (1) It is not proper that I should decide in favour of a maritime lien in the absence of the mortgagees. But the amounts are so small, that probably the mortgagees and the owners will both recognize that the judgments ought to be satisfied out of the proceeds of the ships if they are realized.

Solicitors for the plaintiffs: *Richards & Butler.*
Solicitors for the defendants: *William A. Crump & Son.*

(1) (1886) 11 App. Cas. 270, 281.

E. C. M. T.

1922
Oct. 26, 27, 30, 31;
Dec. 20.

1923
Jan. 17.

ADMIRALTY.

THE SOCRATES AND THE CHAMPION.

Shipping—Collision—Tug and Tow and third Ship—All three Ships to blame—Division of Loss—Tug under Orders of Tow—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1.

In foggy weather the first defendants' steamship in tow of the second defendants' tug coming out of Tilbury Dock came into collision with the plaintiffs' steamship bound up river. The Court found the plaintiffs' vessel one half to blame on the ground of excessive speed and the tug and tow one half to blame for leaving the dock in the prevailing state of the weather:—

Held, that the fact that the tug had to obey the order to start towing given by those in charge of the tow did not excuse the tug owners; that all three vessels were to blame; and that there was no obligation on the Court under s. 1 of the Maritime Conventions Act to apportion the moiety of the blame as between the tug and the tow.

Action of damage by collision.

The plaintiffs were the owners of the *San José*, a screw steamship of 1995 tons gross, laden. The first defendants were the owners of the screw steamship *Socrates*, a vessel of 4978 tons gross, 419 feet long, in ballast. The second defendants were the owners of the tug *Champion*, a vessel of 116 tons gross and 89 feet in length.

The collision took place on the morning of January 27, 1922, in foggy weather in the Thames off the Tilbury Dock entrance to the northward of mid-channel. The *San José* was bound up the river and the *Socrates* was outward bound from Tilbury Dock in charge of a pilot. The *Champion* was fast to the *Socrates* on her port bow and was towing with a scope of 45 fathoms. The *Socrates* was not in collision and received no damage, but the stem of the *San José* struck the port side amidships of the *Champion*, and the result of the collision was that the *Champion* sank.

It was contended on behalf of the *Champion* that if (contrary to the defendants' case) the tug and tow were negligent in leaving the dock when it was too foggy to proceed,

1922

THE SOCRATES AND THE CHAMPION.

the owners of the *Champion* were not responsible for that negligence as they were under the orders of those in charge of the *Socrates*, and the tug had to make fast and start towing when ordered so to do.

Batten K.C. and *Dumas* for the plaintiffs.

Stephens K.C. and *E. A. Digby* for the defendants, the owners of the *Socrates*.

Dunlop K.C. and *Balloch* for the defendants, the owners of the *Champion*.

Cur. adv. vult.

Dec. 20. HILL J. [after dealing with the respective cases and finding the *San José* to blame on the ground of excessive speed, which he estimated as being at least five knots, his Lordship continued :] As regards the *Socrates* and *Champion* it is proved that the thick fog which they encountered as they were crossing the basin was not a sudden and unexpected fog. It had been intermittently foggy more or less all night. The *Socrates* and her tug started from the lock in a lighter interval, when, as they said, they could see across the river, but when according to the lock-master one could see to about mid-river. According to the deposition of the master, he proceeded from Tilbury Dock about 8 A.M., the weather being thick. The wind was light easterly up river. In such circumstances I am advised that it was improper for a large ship like the *Socrates* and her single tug to leave the lock without taking the utmost precautions. They knew that the tide was flood, and that coming out head first they would be across any traffic until the *Socrates* got turned down stream. I am not, on the evidence, finding that that was in itself an improper way to come out, but it was a matter which called for extra care. They knew that though for the time being the fog was less dense it had been increasing and decreasing in density, and might at any moment increase. They knew that they had only one tug ahead—no tug astern. They knew that once they had left the lock they had no means of holding back in the basin, if, while they were crossing it,

1922

THE SOCRATES AND THE CHAMPION.

Hill J.

the weather became so foggy that it was not safe to be under way. They chose to come out with only a single tug and without taking any steps to inquire what the weather was like down the river to windward. I hold that it was negligence to start in the circumstances. That is the only neglect I find. I do not find it was negligent in the *Champion* not to slip earlier than she did. It was contended that the negligence did not contribute to the collision. I am unable to accept that argument. The negligence was continuing in its effect right up to the collision. It is not as if the *San José* had all the time seen what the *Socrates* and *Champion* were doing. Clearly the owners of the *Socrates* are liable for that negligence whether the start was by direction of the master or of the pilot. Are the owners of the *Champion* responsible? It was argued that they were not responsible because the tug was bound to obey the orders received from the *Socrates* and did obey them, and that there was no negligence for which the owners of the *Champion* were responsible. If that be right, the owners of the *Champion* can recover the whole of their damage from the owners of the *San José*, leaving the *San José* to recover one half from the owners of the *Socrates*. If it is wrong, the owners of the *Champion* can recover only half against the owners of the *San José*—I say half because I see no reason to apportion the blame otherwise. The *Champion* was co-operating in an operation which was negligent as regards the *San José* or any other ships in the river. The master was the servant of the owners of the *Champion*. He was, it is true, under a contractual obligation to obey the orders received from the *Socrates*. He may have been under a legal obligation to obey the orders of the pilot of the *Socrates* if, as I suppose, pilotage was compulsory; but in view of s. 15 of the Pilotage Act, 1913, that will not alter the position. If he co-operates in an operation which is negligent as regards the rest of the world, is it any answer to say "I did it because I had voluntarily put myself under the orders of another person"? I think not. Qua the *San José*, the *Champion* cannot be regarded as an innocent ship.

1922

THE SOCRATES AND THE CHAMPION.

The result is that I pronounce the collision to be due to the fault of the *San José* and of the *Socrates* and *Champion*, and I apportion half the blame to the *San José* and half the blame to the *Socrates* and *Champion*.

After discussion as to the effect of the judgment the case stood over for further argument on the form in which the decree ought to be drawn up.

1923. Jan. 17. *Batten K.C.* for the plaintiffs. All three vessels have been held equally to blame and the judgment therefore should be that each bears one third.

[HILL J. No, I held the *San José* half to blame and the *Socrates* and *Champion* half to blame, treating the tug and tow as one unit.]

Stephens K.C. for the owners of the *Socrates*. This is not a joint and several liability on the part of the co-defendants; under s. 1 of the Maritime Conventions Act (1) the moiety of the blame attributable to the *Socrates* and the *Champion* has to be apportioned between them.

Balloch for the owners of the *Champion* adopted the same argument.

HILL J. I have already apportioned the damages and I shall not make any further apportionment. The defendants' liability is joint and several, but of course the owners of the *San José* must not recover the moiety of their damage twice over.

The decree will pronounce that the damages arising from the collision ought to be borne equally by the owners of the *San José* on the one hand and the owners of the *Socrates* and the *Champion* on the other, and will condemn the owners of the *Socrates* and the owners of the *Champion* jointly and severally in a moiety of the plaintiffs' claim for the damage to the *San José*, and will

(1) Sect. 1: "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels .... the damage or loss shall be in proportion to the degree in which each vessel was in fault."

1923

THE SOCRATES AND THE CHAMPION.

also condemn the owners of the *San José* in a moiety of the counterclaim of the owners of the *Champion*. No order as to costs.

Solicitors for the plaintiffs : *Thomas Cooper & Co.*

Solicitors for the defendants, the owners of the *Socrates* : *Stokes & Stokes, for Cameron MacIver & Davie, Liverpool.*

Solicitors for the defendants, the owners of the *Champion* : *Botterell & Roche.*

E. C. M. T.

1923
Jan. 17.

ADMIRALTY.

THE CYCLOPS.

Shipping—Pilotage—Rates for the Liverpool Pilotage District—" Berthing "—" Waiting for tide "—Mersey Docks and Harbour Board's Byelaws, 1921.

Under Part 4 of the schedule to the Mersey Docks and Harbour Board's Pilotage Byelaws, 1921, pilotage rates are levied in the lower Mersey for (*a*) " berthing " a vessel at any stage, and (*b*) " for each time a vessel is transported " in the river. But these rates are subject to the proviso that " berthing a vessel for which a charge is made under Part IV. (*a*)" and " navigating or moving an outward bound vessel to an anchorage to wait for tide " shall not be deemed " a transporting " for the purpose of these charges:—

Held, that an outward bound vessel which had to leave the Alfred Dock on the flood tide and, owing to the presence of other vessels at the stage, was compelled to come to an anchorage to wait for a berth at the Prince's landing stage, was not within the proviso. The whole transportation from dock to stage could not be regarded as " berthing," and " waiting for tide " did not include moving to an anchorage to wait, because the time of high water had forced the vessel to leave the dock earlier than she would otherwise have done for the mere purpose of getting to the stage. The shipowners, therefore, were liable to the Board for the amount charged for " transporting from the dock to the anchorage."

ACTION by the Mersey Docks and Harbour Board against the Ocean Steamship Company, Ld., the owners of the steamship *Cyclops*, to recover the sum of 4*l.* 2*s.* 9*d.* in respect of an item in a pilotage account.

The case was tried on an agreed statement of facts, from

which it appeared that by byelaw 111 of the byelaws relating to pilotage made by the plaintiffs as the pilotage authority for the Liverpool pilotage district under the Pilotage Act, 1913, and the Liverpool Pilotage Order of 1920, "the pilotage rates chargeable in respect of pilotage services of a licensed pilot shall be those set out in the schedule hereto." Part IV. of the schedule related to the river rates for the Lower Mersey, and fixed the rates (*a*) for "berthing a vessel at any stage, wharf, or pier, or alongside another vessel to the northward of an imaginary straight line drawn across the River Mersey from Dingle Point to New Ferry Slip"; and (*b*) "for conducting a vessel from river or dock to the powder or dynamite grounds for the purpose of loading or discharging, and for each time a vessel is transported (i.e., navigated or moved, including manœuvring for the purpose of adjusting compasses or attending the launch of a vessel) anywhere in the River Mersey north of the said line." The charges were, however, subject to the following proviso: "Provided that the following operations shall not be deemed a transporting for the purpose of these charges: (1.) Berthing a vessel for which a charge is made under Part IV. (*a*) of this part of this schedule, and (2.) (ii.) navigating or moving an outward-bound vessel (*a*) to an anchorage to wait for tide; (*b*) To or from an anchorage on account of weather conditions, dragging anchors, or a foul berth."

The defendants wished to arrange that the *Cyclops*, which was lying in the East Float, should berth on November 19, 1921, at the Princes Landing Stage at a time which would permit of her going from dock to stage without anchoring, and they endeavoured to book a berth at the stage at such a time. Owing, however, to the stage being occupied the stage master was unable to allot the *Cyclops* an earlier time than 2.30 P.M. This time the defendants accepted. On November 19 the *Cyclops* left her berth in the East Float at 10.23 A.M. and went into the Alfred Dock. She passed out into the river at 12.30 P.M. in charge of a pilot. The flood tide was then making and the *Cyclops* accordingly anchored until it was time for her to approach the landing stage, by which time

1923

THE CYCLOPS.

the ebb tide was making and the vessel had swung head to it. Having regard to the time of high water on that day and to the fact that she had to wait her turn to undock it would not have been reasonably possible for the *Cyclops* to reach her berth at the stage at 2.30 P.M. or thereafter, without anchoring in the course of that operation. The *Cyclops* remained at anchor until 2.7 P.M., when she hove up her anchor and at 2.55 P.M. berthed at the landing stage, where she embarked her passengers. She left again at 3.40 P.M. and then went in charge of the pilot to an anchorage in the river to wait for the tide. She then put to sea.

In these circumstances the following charges were made by the plaintiffs: Outward pilotage, berthing at stage, attendance (i.e., in excess of the first six hours, while the vessel was lying at anchor), and transporting from dock to anchorage. The defendants paid the first three charges, but refused to pay the fourth, amounting to 4*l.* 2*s.* 9*d.*, for "transporting from dock to anchorage," which they contended was covered by the exceptions contained in the proviso to Part IV. of the schedule.

Bateson K.C. and *E. Stewart Brown* for the plaintiffs.

Langton for the defendants.

[In the course of the arguments, which are fully stated in the judgment, *The City of Cambridge* (1), *The Cachapool* (2) and *The Servia—The Carinthia* (3) were referred to.]

HILL J. The Mersey Docks and Harbour Board sue the Ocean Steamship Company, Ld., the owners of the steamship *Cyclops*, in respect of a sum of 4*l.* 2*s.* 9*d.*, representing a particular item in the pilotage account rendered by the Board as the pilotage authority to the defendants. The matter has been tried upon agreed facts. [His Lordship stated the facts.] The matter in dispute is one which, in my view, must be determined solely upon the interpretation of the byelaws made under the Liverpool Pilotage Order.

(1) (1874) L. R. 5 P. C. 451. (2) (1881) 7 P. D. 217.
(3) [1898] P. 36.

In the case of a ship of the same owners, the *Teiresias*, in circumstances not identical, the pilotage authority did not press the charge for transporting from dock to anchorage. I do not think, however, that case assists me. I have to interpret the byelaw, and whether the plaintiffs made a concession or whether they were acting on what they thought to be an interpretation of the section does not matter. Under the byelaws there is a schedule of rates of pilotage, etc. No. 4 is headed: "River rates for the Lower Mersey and Channel Rates." As regards the rates for the Lower Mersey, by (*a*) there is a charge for berthing a vessel at any stage, and by (*b*) there is a charge for "conducting a vessel from river or dock" to the powder or dynamite grounds . . . . and for each time a vessel is transported (i.e., navigated or moved . . . .) anywhere in the River Mersey north of the said line"—i.e., a line drawn from Dingle Point to New Ferry Slip. To that there is a proviso to the effect that "the following operations shall not be deemed a transporting for the purpose of these charges." The first is with regard to berthing a vessel, for which a charge is made under Part IV. (*a*) of this part of the schedule and 2 (ii.) (*a*) is for "navigating or moving an outward bound vessel to an anchorage to wait for tide."

The words "For each time a vessel is transported (i.e., navigated or moved)," must mean, I think, "for each separate occasion on which a vessel is transported, that is, navigated or moved," and "transported" involves, in my view, moving from one fixed place to another fixed place. To begin with, therefore, there is a charge leviable for each separate occasion on which a vessel is transported from one fixed place to another fixed place in the Lower Mersey. The *Cyclops* was transported from the Alfred Dock to the anchorage at which she was brought at 12.40 P.M. In my view, she was transported from one fixed place to another fixed place, and it seems to me that the ship came within the rule, considered apart from the exceptions. The exceptions are first, berthing and, secondly, navigating an outward bound vessel to an anchorage to await the tide or to and from an anchorage, on account of weather

1923

THE CYCLOPS.

HILL J.

conditions, dragging anchors, or a foul berth. I will deal with the second exception first. It is clear, in my opinion, that this ship was not moved from the Alfred Dock to her anchorage to wait for tide. She was moved to wait for a vacant berth at the Princes Stage. There is nothing to bring the ship within the proviso 2 (ii.). Mr. Langton suggested that moving to an anchorage to wait for tide might include not only moving to an anchorage in order to wait until the time of tide arrived (which to my mind is clearly the meaning of "wait for"), but also include moving to an anchorage to wait because the time of high tide had forced her to leave the Alfred Dock earlier than she would otherwise have had to do for the mere purpose of getting to the landing stage. That is a fallacious argument based upon reading the words "wait for" in a totally different sense. That leaves the question whether what happened in this case—the transportation of the *Cyclops* from the Alfred Dock to the anchorage to which she came at 12.40 P.M.—is not to be deemed a transporting because it was the operation which is described by proviso 1, "berthing a vessel for which a charge is made under Part IV. (*a*) in this part of the schedule." The berthing described is berthing a vessel at the stage, and it seems to me impossible to say that the transportation from the Alfred Dock to the anchorage was within the exception, unless Mr. Langton is right in his contention that the whole transportation must be regarded as a part of the operation of berthing. I do not think it can be so regarded. The operation of berthing referred to in IV. (*a*) is berthing at a stage. In the present case the operation of moving the ship from the Alfred Dock to the anchorage was a preparation for the operation of berthing at the stage, but it seems to me to be a wholly distinct operation—namely, removing a ship from dock to anchorage in order that she may so lie to wait until the operation of berthing at the stage can be accomplished.

For these reasons I am of opinion that the plaintiffs are right and there must be judgment for the sum claimed. It is agreed that as this matter involves a question of principle there shall be costs on the High Court scale.

1923

THE CYCLOPS.

Solicitors for the plaintiffs : *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitors for the defendants : *Stokes & Stokes, for Cameron, MacIver & Davie, Liverpool.*

E. C. M. T.

[IN THE ADMIRALTY COURT AND IN THE COURT OF APPEAL.]

1922
Dec. 18.
C. A.
1923
Jan. 22.

THE KASHMIR.

Shipping—Collision—Loss of Life—Limitation of Action—Ignorance of legal Rights—Discretion to extend Time—Maritime Conventions Act, 1911 (1 *& 2 Geo.* 5, *c.* 57), *s.* 8.

Sect. 8 of the Maritime Conventions Act, 1911, which provides that no action shall be maintainable to enforce any claim against a vessel or her owners in respect of (inter alia) damages for loss of life unless proceedings are commenced within two years from the date when the loss was caused, gives defendants rights which should not without good reason be set aside under the proviso in the section that the Court may extend the period to such extent and on such terms as it thinks fit. The mere fact that the plaintiff did not know that he had a cause of action is not sufficient reason for interfering with the operation of the statutory limitation.

The plaintiff was the mother of an American soldier who was drowned at sea on October 6, 1918, as the result of a collision between the defendants' steamship and the transport in which he was being carried. The plaintiff knew that her son had been drowned, but was unaware until the summer of 1922 of the precise circumstances under which the loss occurred or that she had a legal right of action against the defendants, who had been held partly to blame for the collision. Her writ was issued in December, 1922 :—

Held, by Hill J., that the reason for the delay in issuing the writ was insufficient for the exercise of the Court's discretion to extend the time, and that accordingly the action was not maintainable. On appeal,

Held, by the Court of Appeal, that the learned judge had not proceeded upon any wrong principle and that the appeal failed.

SUMMONS (adjourned into Court for judgment) under s. 8 of the Maritime Conventions Act, 1911, for leave to maintain an action notwithstanding that the time limited for bringing the action had expired. (1)

(1) Maritime Conventions Act, s. 8 : "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel . . . . or damages for loss of

1922

THE KASHMIR.

The summons was issued by one, Mary Trimpe, of Illinois, U.S.A., the mother of an American soldier who had lost his life in consequence of a collision, which occurred on October 6, 1918, between the steamship *Otranto*, then under requisition to the Admiralty, and the P. and O. liner *Kashmir*. Both the vessels were being employed as transports for the conveyance of American troops to Europe. The *Otranto* sank with a loss of over 400 lives.

On May 21, 1920, in an action begun by the Admiralty, as plaintiffs, against the owners of the *Kashmir*, it was decided that both vessels were equally to blame for the collision, and on December 7 of the same year that decision was upheld by the Court of Appeal. In January, 1921, limitation proceedings were instituted on behalf of the *Kashmir*, and in those proceedings a decree was made on April 11, 1921, by the President (Sir Henry Duke) limiting the liability of her owners on claims for loss of or damage to ship and goods to 8*l.* per ton on the tonnage of the *Kashmir* (66,957*l.*), and giving leave to the P. and O. Company to give bail for a further sum of 58,587*l.*, the aggregate amount of 7*l.* a ton, in answer to claims for loss of life or personal injuries. The decree limited the time for bringing in claims to three months from the date thereof, but in giving judgment the President gave liberty to apply within the three months to extend the time for bringing in claims. The decree also directed advertisements in three newspapers, of which one was to be the New York Times.

Prior to the collision with the *Kashmir* the *Otranto* had had a collision with the French sailing vessel *Croisine*. The

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life or personal injuries suffered by any person on board her, caused by the fault of the former vessel . . . . unless proceedings therein are commenced within two years from the date when the damage or loss . . . . was caused. . . . ."

"Provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of Court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the Court . . . . extend any such period to an extent sufficient to give such reasonable opportunity."

1922

THE KASHMIR.

Croisine sank and her crew were taken on board the *Otranto*. Some of the crew of the *Croisine* lost their lives in the collision between the *Otranto* and the *Kashmir*. An agreement had been come to within the prescribed time whereby the rights of the relatives of the deceased French seamen were preserved without going through the formality of issuing writs, but no sums had in fact been paid in respect of the loss of life claims.

In May, 1922, the American Government instructed their London agents to institute proceedings on behalf of the representatives of the deceased soldiers. Some further delay was occasioned in obtaining the particulars as to the various claimants, and on December 5, 1922, the first writ, the subject of the present application, was issued in personam claiming damages for the death of the plaintiff's son Julius Trimpe in consequence of the negligence of the defendants or their servants in and about the navigation of the *Kashmir*. The defendants appeared under protest, and the present summons was taken out on behalf of the plaintiff, asking that the time for bringing her action should be extended on the ground that until informed of the fact by the United States Government she was not aware that she had any right of action.

Langton for the plaintiff.
Dumas for the defendants.

HILL J. [after stating the facts his Lordship continued as follows:] The explanation of the delay in instituting proceedings is, as appears from the affidavit filed in support of the application, that the plaintiff was not aware until the summer of 1922 that she had any cause of action, and it is said that in that respect she is only typical of all the proposed claimants, who are said to number some 400. Of course she must have been aware long before that of the death of her son, but she was not aware that that fact gave her any legal right against the present defendants. Mr. Langton applies under s. 8 of the Maritime Conventions Act and contends that the Court in its discretion ought to extend the time so as to enable

1922

THE KASHMIR.

Hill J.

an action to be brought—as at December 5, 1922—in respect of a cause of action which arose on October 6, 1918. It is only under the discretionary power of the proviso to s. 8 that he can apply. The obligatory part has no application, because there always was—apart from the *Kashmir* being within the jurisdiction and capable of being arrested—from April 11, 1921, a fund in Court. I have to consider therefore whether this is a case in which the Court ought to exercise its discretion in favour of the applicant. It is said that no injury will be done to anybody—other than the defendants—that no competitors to the fund will be prejudiced, and that there has been no laches on the part of the plaintiff or of the tentative plaintiffs. Mr. Dumas has argued that the fact that the plaintiff did not know that she had a right of suit is not sufficient reason for extending the time. Further he points out that although in a sense the defendants would not be prejudiced, inasmuch as they have given security for the fund and therefore they would not be worse off than they would have been if the action had been brought within the statutory time, they have the right to say that the action against them is barred and they would be prejudiced, therefore, if it is allowed to proceed. Over and above that Mr. Dumas alleges that there are certain other people who will be prejudiced. It is agreed that on board the *Otranto* were the crew of a French ship which had previously been run down by the *Otranto*, and on behalf of these men, within the prescribed limit of time, it was intimated that claims would be preferred against the *Kashmir*, and it was arranged that instead of issuing a writ the matter should stand over and they should be treated as though it had been issued. Mr. Dumas points out that if some 400 representatives of American soldiers are to be let in in competition against the fund, then the claims of these Frenchmen will be prejudiced because there will not be nearly enough in the limitation fund to pay everybody in full. Mr. Langton urges in answer to that objection that under s. 8 a discretion may be exercised on such conditions as the Court thinks fit, and that the Court would and ought properly to say that the claims of these

Frenchmen are not to be prejudiced, that they are to have a first claim upon the fund, and that persons let in at this late date should only rank as claimants to the balance. No doubt if I made an order I should make it upon those terms. But the question is whether I ought to make an order at all.

Apart from the Maritime Conventions Act, the claim of this plaintiff and of the other plaintiffs would be absolutely barred at the end of twelve months, as a claim could only be brought under Lord Campbell's Act. The Maritime Conventions Act by s. 8 has extended the time from twelve months to two years. That extended time is not rigidly fixed, as it is qualified by the proviso in relation to the discretion which is given to the Court. Prima facie, however, it is a limit of which the defendants are entitled to have the benefit. It is a statutory limitation which is given to them that they are not to be sued in respect of these life claims after a period of two years. Therefore one starts with that, and it seems to me that it is upon the plaintiff, who comes to have the time extended, to show that there are substantial reasons why the defendants should be deprived of the right to limitation which the law gives them. That, to my mind, was quite clearly indicated in a case to which I have referred in other judgments on this matter: *The James Westoll.* (1) The Court of Appeal in that case refused to interfere with the discretion of the judge refusing an extension of time, and pointed out two considerations which influenced the Court. Lord Parker in the course of his judgment, said: "It appears to me that what the Court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April, 1913, that the amount of the claim could be ascertained. I think that is not a sufficient reason. I think long before two years had elapsed the proposed plaintiff must have known he was in a position to make some claim,

(1) A report of this case appears post, p. 94.

1922

THE KASHMIR.

Hill J.

and that there was plenty of time during which the claim ought to have been made. Therefore it appears to me he has suffered no injustice by reason of the section. On the other hand it is quite possible that if we were to allow the action, which is statute barred, to proceed, the defendants might suffer serious inconvenience and injustice. Therefore it appears to me that no case has been made out for the exercise of this discretionary power." The facts of that case are not identical, but it is clearly in accordance with the opinion of the Court of Appeal that one starts with the fact that the defendant has obtained his limitation, and it must not be interfered with unless there is good reason. The only reason alleged in the present case for interfering is that the plaintiff, though she knew of the loss of her son, did not know that the loss gave her any cause of action. It seems to me that that is a wholly insufficient ground for depriving the defendants of a right which they had otherwise acquired, especially after so long an interval. The fact of the limitation decree does not make it any better for the plaintiff—it makes it worse—because the limitation decree, by fixing a period and giving liberty to apply for an extension, increased the plaintiff's opportunity to bring in a claim and apply for an extension of time for so doing. In my view, therefore, there is no ground shown why the Court should exercise its discretion in favour of the plaintiff to maintain her action or to claim against the fund in Court. The summons will be dismissed with costs. Leave to appeal.

The plaintiff appealed.

1923. Jan. 22. *Langton* (*Dunlop K.C.* with him) for the appellant. The learned judge was misled by the observations of Lord Parker in *The James Westoll* (1) into holding that there is a heavy onus on the applicant for the exercise of the Court's discretion, and accordingly refused to exercise his discretion under a misapprehension. There were no merits in the application in *The James Westoll* (1) and it is obvious that s. 8 was expressly designed to shut out a belated claim

(1) Post, p. 94.

under such circumstances. It is true that Lord Parker said that to allow a statute barred action to proceed might cause serious inconvenience and injustice to defendants. But that would follow in every case in which the discretion was exercised in a plaintiff's favour. In the present case the plaintiff had no means of knowing of her legal rights until she was informed of them by the United States Government. It was not her fault if the Government had not exercised due diligence in the matter. All she knew was that her son had been drowned at sea. It was war time; the circumstances of the loss of the transport would have been concealed; and unless she had seen the advertisement for claims in the limitation proceedings which was inserted in the New York Times —a paper which does not circulate in Illinois—she could not have known that she ought to file her claim before July 11, 1921. Claims against a fund paid into Court in a limitation action are not necessarily excluded by the fact that the time fixed by the order of the Court for filing claims has expired: *The Zoe* (1); and the President, in the limitation proceedings, gave liberty to apply for an extension of time: see also *The Disperser.* (2) In any event the period of one year fixed for bringing in life claims under Lord Campbell's Act is extended to two years by s. 8 of the Maritime Conventions Act: *The Caliph.* (3)

[*Bateson K.C.* This Court is not bound by the decision in *The Caliph* (3) and the respondents will, if necessary, contend that the decision was wrong.]

The plaintiff has not been guilty of negligence, nor of laches, and if the discretion of the Court is exercised in her favour it can be exercised without prejudice to the rights of the French sailors to have a first charge on the fund.

Bateson K.C. and *Dumas* for the respondents were not called on.

LORD STERNDALE M.R. This is an appeal from a decision of Hill J., who declined to act upon the proviso to s. 8 of

(1) (1886) 11 P. D. 72. (2) [1920] P. 228.
(3) [1912] P. 213.

C. A. 1923

THE KASHMIR.

Lord Sterndale M.R.

the Maritime Conventions Act to the extent either of extending the time during which an action might be brought by the appellant against the respondents, or, in the alternative, extending the time within which a claim might be made against a fund which is in Court in a limitation suit brought by the defendants on admitting their liability.

The matter arises out of a collision which had taken place in October, 1918. This writ was issued on December 5, 1922. It is a long time, therefore, after the two years' limitation for bringing such an action which, as the law stands at present, is imposed by s. 8. On May 21, 1920, there was a decree of the Admiralty Court holding both vessels to blame. On December 7, 1920, that decree was affirmed by this Court. A limitation suit was then brought by the Peninsular and Oriental Steam Navigation Company, the respondents, and on April 11, 1921, a decree was made in that limitation suit by the learned President, in which he ordered, among other things, that advertisements of the decree should be published at intervals of not less than a week, beginning from that time up to July 4, 1921, and that claims should be brought in by July 11—that is, a week after the last advertisement. He then concluded the decree by saying that there was liberty to ask for extension of time. That is the way in which it is expressed in the order. It is said that the learned President really meant to give liberty to ask for extension of time within three months. It would not have been a very valuable liberty if that had been what was given ; but I take it from the decree that there was liberty to ask for extension of time.

I will assume—I am not going to decide the question, because it is not necessary—that the decision of Bargrave Deane J., in *The Caliph* (1), is right, that the limitation of time for bringing an action under Lord Campbell's Act is, since the passing of the Maritime Conventions Act, two years, and not one year, as it was before. This plaintiff is wishing to assert a right under Lord Campbell's Act. Before the Maritime Conventions Act she could not possibly have done

(1) [1912] P. 213.

C. A. 1923

THE KASHMIR.

Lord Sterndale M.R.

so, because the action would have been irrevocably barred after twelve months from the loss; but I will assume that the period is now two years. I do not decide it because I do not wish to put any difficulty in Mr. Bateson's way if at any time he wishes to question the decision. But assuming that the period of limitation is two years with power in the Court to extend it, it is said that the power ought to be exercised—in fact, almost that the time ought to be extended ex debito justitiæ—because the appellant was living in one of the middle States of America and did not hear, and could not hear of what had happened, and that all she knew was that her son had been lost at sea. It was said also—I do not think there is any evidence of it, but perhaps we may take judicial notice of the fact—that in all probability the British authorities concealed the loss of the *Otranto*, which was a transport, so far as possible. Hill J. has held that these grounds are not sufficient.

This is a matter of discretion, and no doubt we can interfere with the learned judge's discretion if we like, but we ought not to do so except upon very strong grounds. I cannot see that the learned judge has proceeded upon any wrong principle. It is true that he has cited in his judgment a case which proceeds upon entirely different facts: *The James Westoll.* (1) If he based his decision upon any similarity of the facts of that case with the facts of the present case, I think there would be reason for saying that he was allowing himself, possibly, to be led astray. But he does nothing of the kind. He reads a passage from Lord Parker's judgment which shows that the facts were very different, and then he says: "The facts are not identical." It is perhaps not a very strong way of putting it—they were as different as two sets of facts could be. But the learned judge goes on: "It is clearly in accordance with the opinion of the Court of Appeal that one starts with this, that when the defendant has got his limitation it must not be interfered with unless there is good reason." That is the conclusion that he draws from that case, and it is not questioned as being incorrect.

(1) Post, p. 94.

C. A. 1923

THE KASHMIR.

Lord Sterndale M.R.

But it is said that as the learned judge read a passage in which the different facts were set out, we must conclude that he allowed himself to be misled by the facts in that case, and acted as he ought not to have done in this case. I can see no ground for saying that. It seems to me that the learned judge from that case merely drew the conclusion that the principle which he stated was correct; and in fact the principle stated was correct. I think therefore the learned judge has proceeded upon no incorrect principle, and we ought not to interfere with his discretion. In my opinion the appeal should be dismissed with costs.

WARRINGTON L.J. I agree; and for the same reasons.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant: *Thomas Cooper & Co.*
Solicitors for the respondents: *Freshfields, Leese & Munns.*

C. A. 1913 *Oct.* 31.

[IN THE COURT OF APPEAL.]

THE JAMES WESTOLL.

APPEAL by Hind, Rolph & Co., time charterers of the steamship *Bannockburn*, from the refusal of Bargrave Deane J. to give them leave to commence proceedings against the owners of the late steamship *James Westoll* in respect of loss of freight. On March 2, 1911, a collision took place in the English Channel between the *Bannockburn* and the *James Westoll* in respect of which cross-actions were instituted by ship and cargo owners. These actions were settled under an agreement dated May 10, 1911, which was duly lodged and made an order of the Court. On May 27, 1913, Messrs. Hind, Rolph & Co. notified the owners of the *James Westoll* that they had a claim and applied to Bargrave Deane J. in chambers for leave to institute the action. The learned judge refused to give leave under the discretionary power vested in the Court under s. 8 of the Maritime Conventions Act and the applicants appealed.

LORD PARKER OF WADDINGTON [after stating that the Maritime Conventions Act was passed to give statutory effect to certain conventions which had been made between H.M. Government and certain foreign countries and that he assumed that s. 8 was one of the sections

designed to effect those agreements, continued as follows:] The applicant in the present case was time charterer of the steamship *Bannockburn* which was injured in a collision with the *James Westoll* on March 2, 1911—i.e., before the Act which I have cited came into operation. No proceedings were commenced in respect of loss of freight which the applicant suffered by reason of the collision or something which transpired in consequence of the collision, and no notice of any claim in that respect was given to the owners of the *James Westoll* until May 27, 1913, two months after the statutory period had elapsed. The proposed plaintiff now comes and asks for extension of time in which to commence an action to recover damages. He appeals to the discretionary power of the Court under the first part of the proviso. It appears to me that what the Court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April, 1913, that the amount of the claim could be ascertained. I think that is not a sufficient reason. I think long before two years had elapsed the proposed plaintiff must have known he was in a position to make some claim and there was plenty of time during which the claim ought to have been made. It appears to me therefore that he suffers no injustice by reason of the section. On the other hand it is quite possible that if we were to allow the action, which is statute barred, to proceed, the defendants might suffer serious inconvenience and injustice. Therefore it appears to me that no case has been made out for the exercise of this discretionary power. I should observe also that I do not think we ought in a case of this sort to interfere with the discretion exercised by the judge at first instance unless we are clearly of opinion that he has made a mistake or has been influenced by some wrong principle of law or misconception with regard to the facts of the case. In my opinion the appeal should be dismissed.

LORD SUMNER. I am of the same opinion. The exercise of the power to extend the period mentioned in the first part of the proviso is a discretionary exercise, and I think the learned judge is not shown to have exercised his discretion on any wrong principle. On the contrary I think he exercised it rightly.

WARRINGTON J. I agree.

E. C. M. T.

1923
Jan. 18, 19, 25.

ADMIRALTY.

THE EMPRESS.

Shipping—Damage at Berth—Invitation by Defendant Wharfingers to discharge in Berth belonging to other Persons—Berth Defective—Absence of Knowledge on Part of Defendants—No Duty owing by Defendants to Shipowners.

On arrival at her port of destination, the master of the plaintiffs' sailing barge, which was laden with a cargo of stone for the defendants, a district council, objected, owing to some pile-driving works which were in progress, to bringing the barge to the defendants' berth, which she had occupied on previous occasions. The defendants accordingly assented to the barge being discharged in a neighbouring berth which did not belong to them and over which they had no control. While lying in this berth the barge sustained damage owing to the uneven nature of the ground. The defendants were not aware and had no reason to suspect that the berth was uneven :—

Held, that, even if on the facts it could be said that the defendants invited the plaintiffs to ground their barge in the berth, there was no negligence or breach of duty on the part of the defendants and that they were not liable to the plaintiffs for the damage sustained.

The Moorcock (1889) 14 P. D. 64 and *The Bearn* [1906] P. 48 distinguished.

Action of Damage.

The plaintiffs, Henry W. Richards & Sons, were the owners of the spritsail barge *Empress*; the defendants were the Gosport and Alverstoke Urban District Council.

The action was brought in respect of damage sustained by the *Empress* due to the alleged negligence or breach of duty of the defendants.

According to the statement of claim, on April 3, 1922, the *Empress*, with a cargo of 116 tons of broken granite consigned to the defendants, arrived in Portsmouth Harbour and the master reported his arrival to the defendants' surveyor. The berth which had been occupied by the *Empress* on previous occasions was obstructed by reason of the fact that the defendants were carrying out pile-driving operations, and the master of the *Empress* was therefore ordered by the surveyor on to a berth at a neighbouring wharf owned by Messrs. Ratsey & Lapthorn and known as Ratsey's Wharf. In accordance with these orders the *Empress* berthed alongside Ratsey's Wharf, and when she took the ground was

strained and damaged by reason of the defective and uneven state of the berth.

The plaintiffs alleged that the defendants were negligent in that they (*a*) ordered or caused the *Empress* to be placed in a berth which they knew or had the means of knowing was not safe for her to lie in ; (*b*) failed to take any or proper steps to ascertain whether the berth was safe before ordering or causing the *Empress* to be berthed therein ; (*c*) failed to warn the master of the *Empress* that the berth was unsafe or that they had not taken any or proper steps to ascertain that the berth was safe.

According to the defence, the berth which the *Empress* had occupied on former occasions was not obstructed by the pile-driving operations and there was an entrance through which the barge could have been warped, but the master of the *Empress* refused to go there and asked if there was no other berth available. It was then suggested by one of the defendants' foremen that possibly a berth near by belonging to Messrs. Ratsey & Lapthorn might be vacant. The defendants' surveyor then inquired by telephone whether the berth was available and a representative of Messrs. Ratsey & Lapthorn replied that it was available. The defendants' surveyor then informed the master of the *Empress* that he must make his own arrangements with Messrs. Ratsey & Lapthorn. The berth was in the sole occupation and under the control and management of Messrs. Ratsey & Lapthorn, who charged dues for its use. The defendants further said that if the berth was not in a fit and proper condition to receive the *Empress* (which was denied) they never warranted its condition either directly or by implication to the master of the *Empress* and owed no duty to give any warning to the plaintiffs or their master.

Stephens K.C. and *Dumas* for the plaintiffs. On the facts the berth was not fit for the *Empress* to lie in and ground on. The defendants are liable to the plaintiffs for the damage sustained on the ground of negligence and breach of duty. The defendants owed the plaintiffs a duty not to direct or invite

1923

THE EMPRESS.

the barge to a berth which was in fact unsafe. The defendants had often used the berth and had means of knowing of its condition or should have warned the master that he went there at his own risk. It is immaterial that the defendants did not own and had no control over the berth: *The Moorcock* (1); *The Bearn.* (2) The facts in this case are very similar to those in *The F. de Maerschalck* (3), where Sir Gorell Barnes P. held the defendants were liable; the only distinction between the cases is that in *The F. de Maerschalck* (3) the defendants' servant knew that the berth was defective. But knowledge cannot be a ground of distinction; there is a duty in both cases to warn, in the one case of the defect and in the other that the defendants do not know whether the berth is or is not defective.

Where a person having the right to direct, directs or invites a ship to discharge her cargo at a particular place, it is submitted that the implication in law is that the place is one to which the ship can go without sustaining damage.

Bateson K.C. and *J. Ellis Cunliffe* for the defendants. On the facts the berth was a proper berth and the damage received by the *Empress* was caused by bumping or by her being too old to carry a stone cargo. But assuming that the berth was defective the defendants are not liable. The decision in *The Moorcock* (1) is merely authority for the proposition that wharfingers must not invite vessels to their own premises and set a trap for them by not taking reasonable care to ascertain that the berth alongside—whether they have the control of it or not—is fit for the vessel to ground upon. The defendants did not know and had no reason to suspect that the berth alongside Ratsey's Wharf was defective, and they owed the plaintiffs no duty in that regard. The attempt in *The Calliope* (4) to extend the liability of wharfingers beyond the doctrine laid down in *The Moorcock* (1) failed.

[They were stopped.]

(1) 14 P. D. 64.
(2) [1906] P. 48.
(3) (1906) Shipping Gazette, June 2, 1906.
(4) [1891] A. C. 11.

1923

THE EMPRESS.

HILL J. On the advice received from the Elder Brethren I have come to the conclusion that the barge sustained damage owing to the uneven condition of the berth, but in law I am of opinion that the defendants are not liable. I will put the reasons for my judgment into writing.

Jan. 25. HILL J. The plaintiffs, as owners of the wooden sailing barge *Empress*, complain that she was damaged by grounding on an uneven berth at Gosport on April 3, 1922, and they allege that the damage was caused by the negligence of the defendants. Two sets of questions arise : (1.) Whether in fact the ground at the place where the *Empress* was berthed was uneven and not reasonably fit for her to take the ground, and whether the barge was thereby damaged; and (2.) whether the defendants owed any duty to the plaintiffs which they negligently failed to perform. On the first question I find that the barge did suffer some damage by reason of the unevenness of the ground, and that the place where she took the ground was not reasonably fit for her to do so. On the second question I find that the defendants did not fail in any duty which they owed to the plaintiffs.

The defendants are the Urban District Council for Gosport. They had a contract with Messrs. Brookes, Ld., for the supply of stone for road-making purposes to be delivered to Gosport Beach in sailing vessels. Messrs. Brookes had contracted with Messrs. Richards & Sons of Portsmouth, the plaintiffs, for the carriage of the stone from Alderney to Gosport Beach. The *Empress*, belonging to the plaintiffs, shipped 116 tons of broken granite under a bill of lading for " Gosport Beach as ordered " to the order of Messrs. Brookes, Ld. It was not disputed that the defendants took delivery of the stone under that bill of lading. Gosport Beach is a defined place. It does not mean any part of the beach at Gosport, but a part of the beach known as Gosport Beach or Gosport Hard. Before April 3 the *Empress* had brought several cargoes of stone and delivered them on Gosport Beach to the defendants' carts. The defendants were in process of reclaiming Gosport Beach and converting it into a promenade. That involved

1923

THE EMPRESS.

Hill J.

pile driving. The *Empress* arrived off Gosport Beach on April 3. Her master formed the opinion that the works in progress made it impossible or difficult for him to bring his ship into Gosport Beach, and so told the defendants' road surveyor, whose duty it was to take delivery of the stone. In the result it was arranged between them that the *Empress* should discharge on to a wharf belonging to Messrs. Ratsey & Lapthorn, known as Ratsey's Wharf, and that the defendants should take delivery there on the following morning. The same day the *Empress* proceeded to Ratsey's Wharf and made fast, and the master, who lived in Portsmouth, went home for the night. What the two other members of the crew did was not proved ; they were not called. On the morning of the 4th the master returned and found that the *Empress* had a good deal of water in her. She had, as was expected, grounded at low water. The plaintiffs say that she was badly strained, and the reason was that the berth was uneven. The defendants suggested that she was damaged by bumping, or that the leaks were caused by age. [His Lordship dealt with the evidence on these points and continued :] I find that the damage was caused by the nature of the berth and was caused on this occasion, and that the ground was in fact not such that the loaded barge could safely lie upon it.

But the defendants had no control over the ground on which the *Empress* lay, they had had not even the control of a riparian owner. The wharf was not the defendants' wharf, but Messrs. Ratsey & Lapthorn's. The defendants owed the plaintiffs no duty to make the berth safe. In *The Moorcock* (1) Bowen L.J. quotes Holt C.J.: "It would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform." Nor were the defendants like the harbour trustees in *The Bearn* (2), a public body with a statutory duty. Nor were they persons like the defendants in *The Moorcock* (1) or the railway company in *The Bearn* (2), who, owning the premises, invited for profit to themselves another to come to their premises.

(1) 14 P. D. 64, 70. (2) [1906] P. 48.

1923

THE EMPRESS.

Hill J.

On the facts, I cannot find that the defendants invited the *Empress* to go to Ratsey's Wharf at all. They certainly did not order her to go there; they had no power to give any such order. Neither side was clear as to who first suggested Ratsey's—the master of the barge or the defendants' foreman. The defendants would have preferred to take delivery at the usual place on the Beach. The master wanted to go to Ratsey's and the defendants assented. But even if the defendants invited the *Empress* to go there, I cannot find any breach of duty. Neither the master nor the defendants were aware of the inequalities of the ground. The defendants had in the past taken delivery of stone at Ratsey's from other craft. No one said that any other craft had suffered damage or made any complaint. There was nothing to put the defendants upon inquiry as to the safety of the berth. The master was a Portsmouth man and probably knew as much or as little as the defendants about the character of the ground at Ratsey's.

Mr. Stephens referred me to *The F. de Maerschalck* (1), but in that case the man who was found to have ordered the ship to the bad berth as agent of the defendants said in evidence that he knew it was a dangerous berth and gave no warning. That is the sort of case referred to in the judgments in *The Calliope* (2), of a danger known to the inviter, and not known to the invitee. Put at the highest for the plaintiffs, the present case is one in which the defendants invited the plaintiffs to ground a ship upon premises belonging to neither of them which contained a trap which neither of them knew of nor had reason to suspect.

There was no negligence in my view on the part of the defendants towards the plaintiffs. I therefore give judgment for the defendants with costs.

Solicitors for the plaintiffs: *W. & W. Stocken.*

Solicitors for the defendants: *James, Mellor & Coleman, for E. J. Bechervaise, Portsmouth.*

(1) Shipping Gazette, June 2, 1906.

(2) [1891] A. C. 11.

C. A.

1923

Jan. 29, 30; *Feb.* 12.

[IN THE COURT OF APPEAL.]

THE COLORADO.

Shipping—Priorities—French Ship arrested in England—Necessaries Men—Claimants under a French Mortgage—Lex Loci—Lex Fori.

According to French law, the mortgagee of a ship under a French hypothèque, although he has not the same right of property as that given by the Merchant Shipping Act in respect of an English mortgage, has a right to arrest the ship in the hands of a subsequent owner. His claim, however, is postponed to that of a necessaries man.

On a motion to determine priorities between English claimants, in respect of necessary repairs effected upon a French ship and claimants under a French hypothèque upon the ship:—

Held, that as the rights given under the hypothèque must be determined according to French law, which gave greater rights than those given by English law to a necessaries man who had merely the right to sue in rem, the claim of the necessaries men, according to the lex fori by which the question of priorities must be determined, was postponed to the claim of the mortgagees.

Decision of Hill J. affirmed.

Appeal from a decision of Hill J. on a motion to determine priorities.

The appellants were Hills Dry Dock and Engineering Company, Ld., ship repairers of Cardiff, who had effected repairs to the French steamship *Colorado*, and, failing to obtain payment of their claim, had arrested the vessel in an action in rem, and in November, 1921, obtained judgment and an order for sale. The vessel was sold by the Marshal and the proceeds, about 6000*l.*, paid into Court. A caveat against payment out was entered by the respondents, the Credit Maritime et Fluvial de Belgique, mortgagees under a French deed of mortgage on the *Colorado* for nearly 41,000*l.* The respondents obtained judgment in the Admiralty Court against the owners of the *Colorado* in May, 1922, and on December 11, 1922, the motion to determine priorities and for payment out came before the Court.

Hill J., in delivering judgment, said that having heard evidence as to the French law he had come to the conclusion that the mortgagees must have priority as against the proceeds of the res over the necessaries claimants. Messrs.

Hills had no possession. Their only right was that given them by statute to proceed in rem against the ship. Until the moment of the arrest in their action they had no right in the ship at all. At that moment, and for some time before, the ship was subject to the French mortgage. There could be no question that as between competing creditors of the owner of the res, the priority of claims was governed by the lex fori. Of course no one could come into that competition at all unless he had either a right of property of some sort in the res, or by statute or otherwise had a right to sue in rem. The Court, therefore, had first to ascertain whether the claimant was one who had at least a right in rem. The next step, as regards priorities, was to ascertain whether he had something more than a mere right to sue the ship in rem.

In the present case the mortgagees had obtained judgment without objection in a suit in rem. It was contended, however, that the holder of a registered mortgage on a French ship, according to French law acquired no sort of property in the ship, and had merely the right to proceed against the ship by legal process similar to the right which by English law the necessaries man had.

Upon the evidence which had been given by the French lawyer, in his Lordship's opinion that contention was unsound. The French mortgagee, by French law, had what had been described as a jus in rem, which apparently involved no right to take possession, but only a right to proceed by legal process for the seizure and sale of the ship. But that was a right which travelled with the res into whosesoever's hands it might come. That right seemed to him to be much more than a mere right to proceed by legal process against the ship ; it was a right which could be enforced whether the ship at the time of enforcement belonged to the debtor or belonged to some one else. It was in the nature of a right of property, although a limited right of property. At the moment when the necessaries men first acquired any interest in the ship—namely, at the moment when they arrested the ship—the mortgagees already had in her the right of

C. A. 1923

THE COLORADO.

property of the kind he had described. In substance that right of property appeared to his Lordship to be not very different from the right of property of the mortgagee under an English mortgage, as to which, by s. 34 of the Merchant Shipping Act, 1894, it was provided that "except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof." He thought therefore that he was bound to apply to that right the English law of priorities, and applying it he was bound to say that the holder of the French registered mortgage had priority over the necessaries men.

The necessaries men appealed.

R. A. Wright K.C. and *Balloch* for the appellants. The question as to the position of the French mortgagee is not one of remedy but of substantive right, and depends on the law applicable to his rights. It is necessary, therefore, to see what rights, under French law, are given to French mortgagees of a ship ; and under that law the evidence is that they are postponed to necessaries men. The French mortgage must be construed according to French law ; the English Court, therefore, when it has to construe the contract and to decide between competing claims, must see what remedies are subordinated to the rights. The exact nature of the mortgage under French law should have been considered : *Simpson* v. *Fogo* (1) ; see also *Clark* v. *Bowring & Co.* (2) Although, under an English mortgage and according to English law, the mortgagee would rank before the necessaries man : *The Tagus* (3), there is no authority for saying that mortgagees have a maritime lien and under a French mortgage the mortgagee is not in as good a position as he would be under an English mortgage. The French mortgagee has no property in the res such as the English mortgagee has under s. 34 of

(1) (1862) 1 H. & M. 195, 230. (2) 1908 S. C. 1168.
(3) [1903] P. 44.

the Merchant Shipping Act, 1894; he merely has the right to arrest the ship in whosesoever hands she may be. The learned judge therefore was wrong in holding that the mortgage claim must be preferred to the claim of the necessaries men. Reference was also made to *The Manor* (1) and to Dicey's Conflict of Laws, 3rd ed., p. 765.

Dunlop K.C. and *Dumas* for the respondents. Under the Admiralty Court Act, 1840, the necessaries man can only institute his action against a ship subject to any legal or equitable charge which has already attached to her. By electing to bring their action in this country under that statute the necessaries men exposed themselves to the further disadvantage that the French mortgagees, who could not have sued in rem in the Admiralty Court, were enabled to do so, the ship being already under arrest: see s. 3 of the Admiralty Court Act, 1840. In May, 1922, when the mortgagees obtained judgment against the proceeds, subject to priorities, their substantive rights were determined and the only question left to be determined on the motion was that of priorities.

The effect of the evidence was that the respondents had rights very similar to those of a maritime lien holder, and once it was established that a jus in re existed the exact rights which the mortgagees might have in France were immaterial. The right of priority is not part of the mortgage contract, and the English Court on the question of priority had merely to apply the lex fori. In *Clark* v. *Bowring & Co.* (2) Lord Kinnear said: "The true question is not what the contracting parties in New York intended, but whether the contract had the effect of creating a real security over a British ship, and consequently over the proceeds of the sale of that ship when it is sold in Scotland . . . . that is a question for the lex fori": see also *The Union.* (3)

[Reference was also made to *The André Théodore.* (4)]

Balloch replied.

Cur. adv. vult.

(1) [1907] P. 339.
(2) 1908 S. C. 1168, 1177.
(3) (1860) Lush. 128.
(4) (1904) 10 Asp. M. L. C. 94.

C. A. 1923

THE COLORADO.

Feb. 12. The following judgments were read :—

BANKES L.J. This is an appeal from an order of Hill J. deciding the question as to priorities in respect of the payment out of the net proceeds of the sale of the steamship *Colorado* as between the Hills Dry Docks and Engineering Company, claimants for necessaries, and the Credit Maritime et Fluvial de Belgique claiming as mortgagees under a French deed of mortgage. The learned judge decided the question in favour of the bank. There is, I think, no doubt as to the rule of law applicable to the case. The difficulty arises in the application of the law to the facts, and in giving the true interpretation to the French law.

The facts are as follows. Messrs. Hills had no possessory lien ; they commenced an action to recover the amount due to them for repairs, and the vessel was arrested in their action. They recovered judgment on November 14, 1921. The bank also commenced an action, but did not recover judgment until May of the following year. Reliance has been placed upon the form of this judgment. It is said that, because in this judgment the bank's security is described as a mortgage deed, it must therefore, for all purposes of priority, be treated without further inquiry as an English mortgage and given priority as such. I do not agree with this suggestion. The judgment is expressed to be without prejudice to other claims against the vessel, and all questions of priorities are reserved. This, in my opinion, leaves the question quite open as to what the rights created by the so-called mortgage deed are. This question must be determined according to French law, as the contract was made in France, though the question of priority must be decided by English law. The reason for this rule is, I think, well and clearly stated in a passage in the judgment of Marshall C.J. in *Harrison* v. *Sterry* (1), where he says : " The law of the place where a contract is made is, generally speaking, the law of the contract—i.e., it is the law by which the contract is expounded. But the right of priority forms no part of the

(1) (1809) 5 Cranch, 289, 298.

contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the Court sits which is to decide the cause."

The argument for the appellants in this Court, as I understood it, raised one question which is not referred to in the judgment of the learned judge. It was to the effect that the right created by a French mortgage, as the result of the amendment of art. 191 of the Code de Commerce by art. 34 of the law of July 10, 1885, was a limited right only, and limited to a right to follow after the creditors given priority by art. 191, among whom are creditors of the class of the Hills Dry Docks Company. I do not think that this contention is well founded. Both article and amendment appear to me to deal with remedies as opposed to rights, and they cannot, therefore, be taken into consideration for the purpose of ascertaining what the rights of the respondents are under the document referred to in these proceedings as the French mortgage. If this is the correct view, the only remaining question is whether the learned judge put the true interpretation upon the documents and upon the evidence of the French lawyer who was called to state what, by French law, the rights of the respondents were under the mortgage deed.

I do not think that the evidence left the question entirely free from doubt, but in my opinion the learned judge was quite justified upon the evidence in taking the view he did—namely, that the right created by the mortgage deed was a higher right than a mere right to proceed in rem, and though not capable of exact description in terms applicable to well-recognized English rights, it yet had attributes which entitled it to rank on a question of priorities in the same class as a maritime lien or the right created by an English mortgage. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

SCRUTTON L.J. The French ship *Colorado* was arrested in a proceeding in rem in this country, and sold. The proceeds were claimed: (1.) by Cardiff repairers claiming as necessaries men for repairs done to the ship at Cardiff; (2.) by

C. A. 1923

THE COLORADO.

Scrutton L.J.

a foreign bank claiming under a French hypothèque. By the law of England the necessaries men, who had no possessory lien, had only a right to proceed against the ship in rem for a debt of her owners at the time of arrest, and would rank in priority after a claimant who had by the law of England a maritime lien—that is to say, a right to proceed against the ship in rem in the hands of subsequent owners for a debt incurred by a previous owner, still more after an English mortgagee who had a right of property in the ship : see *The Two Ellens.* (1) But in this case the necessaries men contended that by the law of France the hypothèque was postponed to the claim of a necessaries man, and should therefore also be postponed by the law of England.

It is clear law in England, as stated by Lord Brougham in *Don* v. *Lippmann* (2), that " whatever relates to the remedy to be enforced, must be determined by the lex fori, the law of the country to the tribunals of which the appeal is made." The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right. Thus in *The Milford* (3), where an American master of an American ship claimed in England a lien on the freight for his wages, Dr. Lushington declined to consider whether by United States law he had no such lien, but applied the lex fori, saying : " The proceeding originated in this country ; it is a question of remedy, not of contract at all." This was followed by Phillimore J. in *The Tagus* (4), where the learned judge excluded the law of the flag which gave the master a lien only for wages for his last voyage, and applied the lex fori, which gave him an unlimited lien. Hamilton J., in *American Surety Co.* v. *Wrightson* (5), applied the same principle when he excluded evidence of the remedies given on an American contract by American law, saying that as contribution between co-insurers depends not on contract but on equity, the law governing

(1) (1872) L. R. 4 P. C. 161.
(2) (1837) 5 Cl. & F. 1, 13.
(3) (1858) Swa. 362, 366.
(4) [1903] P. 44.
(5) (1910) 16 Com. Cas. 37.

the matter must be the law of the tribunal to which the party who is required to do equity is subject, and not the law of the domicil or the law of the contract. It is clear that priorities of creditors in bankruptcy, or intestacy, are dealt with by the lex fori, and not by the law of the countries where the debts are contracted, except so far as such laws are necessary to establish that there are debts. The same result follows in the case where an English Court divides amongst creditors the proceeds of a ship arrested and sold in England.

Now the English Court has a claim from an English necessaries man who has no possessory lien or maritime lien, but merely in England a right to arrest the ship in rem to satisfy his claim against the owner of the ship. It has also a claim by a person who has a hypothèque, and it may legitimately consult the foreign law as to what a hypothèque is. It is proved to be, not a right of property in the ship, but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a maritime lien as described by Mellish L.J. in *The Two Ellens* (1), by Gorell Barnes J. in *The Ripon City* (2), and by this Court in *The Tervaete.* (3) And the English Courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man, who cannot arrest the ship against a subsequent owner.

The fallacy of the appellants' argument appears to be that because the French Courts would give a French necessaries man, or a necessaries man suing in the Courts of France, priority over the claimant under a hypothèque, therefore an English Court should give an English necessaries man similar priority. The answer is that the appellants are not asking for French remedies, but English remedies; and the English law postpones them to persons who have what is equivalent to a maritime lien.

For these reasons I think that the judge below came to

(1) (1872) L. R. 4 P. C. 161. (2) [1897] P. 226, 241.
(3) [1922] P. 259, 264.

C. A. 1923

THE COLORADO.

a right conclusion in postponing the English necessaries men to the hypothècaires, and that the appeal should be dismissed.

ATKIN L.J. I have found considerable difficulty in this case, but with some hesitation have come to the conclusion that the appeal should be dismissed. The relevant principles of law are not in dispute; their application is contested. Where parties are litigating in this country in respect of rights created elsewhere, to ascertain their rights we may look, in appropriate cases, to the law of the country where the contract was made, or where the thing over which rights are claimed was situate, or where the person claiming the right is domiciled; but to ascertain the remedies which the Court will give to enforce the rights we have to look to the law of this country, the lex fori.

Now when an action in rem has been brought in these Courts in respect of a ship, the Court by its decree controls the money which represents the res as the result of sale or bail, and directs payment to be made to such claimants as prove their claims in the order of priority directed by the Court. To give the necessary directions the Court may have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the res at all. For instance, the claimant may claim a right of property in the ship granted to him abroad. The Court must examine the lex loci contractus—I assume for argument's sake this to be the relevant law—to see whether any right of property is given, and the nature of it. A claimant claims as an English necessaries man; his right is only to have the Court award him a particular remedy. He has no right to the ship or the proceeds independent of the remedy. A claimant claims as possessing a maritime lien. This might appear to be an intermediate case, as a maritime lien gives a right against the ship, which continues notwithstanding a change of ownership. Nevertheless, in determining whether there exists a maritime lien the Court will apply the lex fori, and will give effect to the

lien as it exists by English law: see *The Milford* (1) and *The Tagus*. (2)

I think it follows that prima facie, when the Court is ordering that payment should be made to claimants in a particular order, it is merely awarding a remedy, and therefore will apply the lex fori. But, as I have said, it must first ascertain whether there is any claim at all. Now, when a claimant comes forward alleging that he holds a right given to him by agreement, which is something other than a maritime lien, he must prove what that right is by the law of the place of the contract. This raises the difficulty in this case. The appellants say that the respondents' right is to be determined by French law, and by that law it is not a right of property, but a right to have the ship seized and sold by judicial authority, and to be paid the proceeds—not absolutely, but after payment has been made to certain classes of creditors, including necessaries men. They say that such a right differs essentially from a right such as is given by an English mortgage ; and admitting that the lex fori determines their own right, and would postpone it to a true mortgage, they say that the claimants make no title at all to anything except to payment in the order prescribed by French law.

I think that the argument is attractive. It seems a narrow distinction to say that the right to be paid out of the proceeds is to be determined by the lex loci, but the right to be paid out of the proceeds in a prescribed succession by the lex fori ; and I hesitate to say what should be the result had the written document on the face of it contained an express limitation of a right to be paid only after named classes of creditors.

I think myself that the question is one of fact—namely, the nature of a hypothèque on a ship as created by French law. One has to deal with such questions remembering the presumption that unless there is proof to the contrary foreign law will be presumed to be the same as English. I do not think that the French law on the subject was very clearly elicited, and I am not prepared to differ from the finding of the learned judge, who, I think, came to the

(1) Swa. 362. (2) [1903] P. 44.

C. A. 1923

THE COLORADO.

Atkin L.J.

conclusion that the only right given was the right to have the ship seized and the proceeds applied to payment of the hypothèque, notwithstanding a change of ownership—a right closely resembling a maritime lien—and that the order of priorities was a provision as to the remedy that would be given by French law, and therefore would not be followed in an English Court.

It is plain that the appellants can only succeed by showing that the respondents have no right to which the English Court could award a prior remedy, and on the judge's finding the appellants fail. Whether on some other occasion some other view of the French law could be maintained it is unnecessary to consider. In the present case I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff.*

Solicitors for the respondents: *Denton, Hall & Burgin.*

E. C. M. T.

1923
Feb. 12, 26.

ADMIRALTY.

(IN PRIZE.)

THE WILHELMINA.

Prize Court—Limitation of Action—Seizure and Detention of Ship—Release—Action against the Procurator-General for Damages—Public Authorities Protection Act (56 & 57 *Vict. c.* 61), *s.* 1.

The Public Authorities Protection Act, 1893, s. 1 of which provides a limitation of six months for instituting an action against any person for any act done in pursuance or execution of an Act of Parliament or of any public duty or authority, does not apply to an action in prize brought against the Procurator-General, as the representative of the commissioned captors, in respect of the alleged illegal seizure and detention of a ship and cargo.

TRIAL of a preliminary issue in an action brought by the Namlooze Vennootschap Maatschappij de Kotter, owners of the Dutch steam trawler *Wilhelmina* (suing on behalf of

1923

THE WILHELMINA.

themselves and the master and crew of the vessel), against the Procurator-General, claiming damages for the seizure and detention of the trawler and her cargo.

In June, 1916, the *Wilhelmina*, while on a voyage to the Icelandic fishing grounds, was seized by one of His Majesty's ships and brought into port. Her cargo of salted fish was sold, and the proceeds paid into the Prize Court, but no writ in prize was issued either against the vessel or the cargo. In September, 1916, the vessel was released, and the Procurator-General consented to the release of the net proceeds of the cargo; but the plaintiffs declined to accept that sum and the proceeds remained in Court. In these circumstances, in February, 1921, the present action was brought, and the Procurator-General by his answer to the plaintiffs' petition, in addition to justifying the seizure on the ground that the cargo was of a contraband character and that there was reason to suspect that it had an enemy destination, raised the contention that the action was barred by s. 1 of the Public Authorities Protection Act, 1893. This section provides that no action, prosecution, or proceeding shall lie, or be instituted, against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, unless such action or proceeding be commenced within six months of the matter complained of.

This question was argued as a preliminary point.

Bateson K.C., *John H. Harris* and *G. St. C. Pilcher* for the plaintiffs. The Public Authorities Protection Act does not apply in this case for the following reasons: (*a*) The claim is not an "action or other proceeding" within the meaning of s. 1 of that Act; (*b*) the claim is against the captor, and the Procurator-General in his capacity as representing the captor is not a public authority; (*c*) the act complained of was wholly illegal and not within the scope of the public duty or authority of the captor. Proceedings in prize are not "civil" proceedings and statutes of limitation do not apply in prize: see Story's Principles and Practice

1923

THE WILHELMINA.

of Prize Courts (Pratt's ed.), p. 40, and *The Mentor* (1) and *The Huldah* (2) there referred to.

It is not every proceeding to which the Act applies—e.g., a prerogative writ of mandamus: *Rex* v. *Port of London Authority* (3), or a writ of certiorari: *Roberts* v. *Metropolitan Borough of Battersea* (4); claims for compensation under the Lands Clauses Acts: *Delany* v. *Metropolitan Board of Works* (5); an action in rem: *The Burns* (6), following *The Longford.* (7) An arbitration is not a "proceeding" within the meaning of the Act: *Glasgow Corporation* v. *Smithfield and Argentine Meat Co.* (8) The Act cannot prevent a Prize Court, which administers international law, from investigating the validity of a seizure and sale of a ship or goods. The only reference to prize matters in the Act is that by s. 2 so much of any public general Act as enacts that in any proceeding to which the Act applies the proceeding is to be commenced within a particular time, is repealed, and among the portions of Acts so repealed is s. 51 of the Naval Prize Act, 1864. But that section merely provided a six months' limitation in respect of proceedings for any alleged irregularity or trespass done by a person acting under the authority of the Act; the section did not apply to proceedings jure belli, and it was not re-enacted in the Naval Prize Act of 1894. The seizures and detention complained of were made in the exercise but in excess of belligerent rights: cf. *The Oscar II.* (9)

Sir Douglas Hogg A.-G., Sir Thomas Inskip S.-G. and *C. W. Lilley* for the Procurator-General. This claim instituted by writ is clearly an "action" as defined by s. 100 of the Judicature Act, 1873—i.e., a civil as opposed to a criminal proceeding. It is an action for damages, and in *Rex* v. *Port of London Authority* (10) Bankes L.J. said that the Public Authorities Protection Act "seems to contemplate

(1) (1799) 1 C. Rob. 179.
(2) (1801) 3 C. Rob. 235.
(3) [1919] 1 K. B. 176.
(4) (1914) 110 L. T. 566.
(5) (1867) L. R. 2 C. P. 532; 3 C. P. 111.
(6) [1907] P. 137.
(7) (1888) 14 P. D. 34.
(8) 1912 S. C. 364, 373.
(9) [1920] A. C. 748.
(10) [1919] 1 K. B. 176, 186.

something which results, if successful, in the payment of damages." The reason the Act does not apply in cases such as *Delany* v. *Metropolitan Board of Works* (1) is that the words "against any person" imply a claim of a hostile character. These words also account for the decision in *The Burns* (2), for an action in rem is not an action against any person. It has been held that the Act applies to officers of the Crown: *The Danube II.* (3); see also *Parton* v. *Williams* (4), where it was held that a constable acting under a warrant was entitled to the protection of the Constables Protection Act, 1750. The seizure in this case was clearly in execution of a public duty.

The plaintiffs are in this dilemma: Either the claim is against the captor—i.e., a public officer, or it is against the Crown, in which case no action lies at all. The Legislature clearly intended proceedings in prize to be within the protection of the statute, as s. 2 in terms repeals s. 51 of the Naval Prize Act, 1864, which deals with the limitation of actions against the captor. It is to be inferred therefore that any proceeding in prize against a captor, and, accordingly, any proceeding against the Procurator-General who takes the place of the captor (*The Zamora* (5)), is brought within the limitation in the Act of 1893.

[THE PRESIDENT. Did the limitation in s. 51 deprive claimants of their right to the issue of a monition, or could it be said that a monition is analogous to a proceeding by way of certiorari or mandamus?]

Under the Prize Court Rules a claimant cannot ask for the issue of a monition directed to the captor to proceed to adjudication if he intends to make a claim for damages: see O. 5, r. 4.

[THE PRESIDENT. Can the Procurator-General escape liability by not instituting proceedings against the ship or goods?]

The Procurator-General has not assumed the position of

(1) L. R. 3 C. P. 111.
(2) [1907] P. 137.
(3) [1921] P. 183.
(4) (1820) 3 B. & Al. 330.
(5) [1916] 2 A. C. 77, 109.

1923

THE WILHELMINA.

the captor within the meaning of Lord Sumner's judgment in *The Oscar II.* (1) This is the class of case expressly left open by the Privy Council in that case. The ship was released before the period of six months had elapsed, and the plaintiffs were informed that they could have the proceeds of sale of the cargo at any time.

Bateson K.C. in reply. Where the goods are still detained it is unnecessary for the claimants to issue a writ: see O. 5, r. 1, of the Prize Court Rules. If the Legislature intended an action in prize of this nature to be protected by the statute, it would have so provided; the words used are not apt or wide enough to cover this case. [*Newell* v. *Starkie* (2) was referred to.]

Cur. adv. vult.

Feb. 26. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: On February 10, 1921, the plaintiffs, the owners and crew of the Dutch steam trawler *Wilhelmina*, instituted by a writ in prize, to which H.M. Procurator-General was made defendant, a cause in which they claimed declarations that a certain seizure and detention of the *Wilhelmina* were illegal and that they are entitled to damages in respect thereof; and for consequential relief. The writ was issued in pursuance of the Prize Court Rules of 1914, Orders II. and V. (3) The Procurator-General appeared, and the plaintiffs delivered a petition whereby they allege that in June, 1916, the *Wilhelmina*, being a neutral vessel with no contraband on board, was taken as prize by one of His Majesty's ships on the high seas in a voyage from the Iceland fishing grounds to Ymuiden, in Holland, was placed under a prize crew and brought into Lerwick and from thence successively ordered to Kirkwall, Peterhead and Dundee, and detained until September, 1916; that her perishable cargo of fish

(1) [1920] A. C. 748, 753.

(2) (1919) 89 L. J. (P. C.) 1.

(3) By O. V., r. 2, "where a ship has been captured as prize, but has been subsequently released by the captors, or has, by loss, destruction or otherwise, ceased to be detained by them without proceedings for condemnation having been taken, any person interested in the ship wishing to make a claim for costs and damages in respect thereof, shall issue a writ as provided by Order II."

had to be jettisoned and that the remainder, consisting of salted fish and livers in barrels, was sold and the proceeds paid into Court. The petition concludes by praying the declarations set out in the writ, with an alternative claim for payment to the plaintiffs of the proceeds of the alleged sale. The Procurator-General by his answers justifies the acts complained of in the petition on grounds which would appear prima facie to warrant a seizure and detention in prize, and a sale under the Prize Rules, and pleads further as to the proceeds of sale his consent before writ to the release of such proceeds to the plaintiffs "subject to the proper deductions shown in the a/cs of the Admiralty marshal." The Procurator-General further pleads by para. 4 of his answer, as follows: "In answer to the claims made by the petition herein other than the claims to the said proceeds the defendant will rely upon the provisions of the statute 56 & 57 Vict., ch. 61, s. 1." The statute so pleaded is the Public Authorities Protection Act, 1893.

The question of law raised by para. 4 of the answer of the Procurator-General has been brought to hearing and is now to be disposed of.

The limitation of actions contained in the Public Authorities Protection Act, 1893, and relied upon by the Procurator-General, is expressed so far as is material here in the words following: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority . . . . the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

No question was raised at the hearing as to the precise mode in which the claim of the plaintiffs has been framed in their writ and petition, the object in view on the part of the

1923

THE WILHELMINA.

The President.

defendant being, as I understand, to determine whether the claims in prize of the plaintiffs are barred by the statute. The principal points discussed were these: Is this cause in prize an action or proceeding within the meaning of the statute? Is the Procurator-General within the protection of the statute? The plaintiffs alleging that the acts complained of were wholly illegal, does the statute in any event apply? By reason of the payment into Court of the proceeds of the sales in question the jurisdiction in prize has undoubtedly attached. As is pointed out in the judgment of the Privy Council in *The Zamora* (1), "the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. If captors do not promptly bring in the property seized for adjudication, the Court will at the instance of any party aggrieved compel them so to do. From the moment of seizure the rights of all parties are governed by international law." Under the circumstances of the case if any question had arisen as to the form of the plaintiffs' claim I should no doubt have so dealt with it as to secure that the broad question raised by the plea of the statute could be determined.

In the course of the argument numerous decisions of English Courts of municipal jurisdiction as to the construction and scope of the statute in question were cited on both sides. The Attorney-General relied in particular upon the judgments in *The Danube II.* (2) in this Court and in the Court of Appeal, for the proposition that a commissioned naval officer in the service of the Crown acting in the course of his duty is a person acting in the execution of a public duty or authority and entitled to the protection of the statute. Upon the question of construction reference was made also to the definition of "action" in the Judicature Act, 1873, s. 100; and in answer to an observation that statutes of limitation have not heretofore been deemed to apply to claims in prize the Attorney-General argued that the Public Authorities Protection Act, 1893, falls outside of any presumption founded on the old practice in prize by reason that it deals expressly with a limitation of actions which was enacted with regard to

(1) [1916] 2 A. C. 77, 108. (2) [1920] P. 104; [1921] P. 183.

certain matters in this jurisdiction by the Naval Prize Act, 1864.

A point was raised under the Prize Rules, 1914, as to the extent of the liability of the Procurator-General in a cause where he becomes a party in substitution for a commissioned captor. On behalf of the claimant Mr. Bateson asserted a right of the plaintiffs to insist, if and when this case comes to be heard, upon alternative allegations that the seizure, detention and sale in question were made in the exercise of belligerent rights, and that they were acts wilfully done in excess of belligerent rights. Upon this question the judgment of the Privy Council in *The Oscar II.* (1), and in particular the observations made by Lord Sumner with regard to the limits of the liability of the Procurator-General, were brought to my attention. For the purposes of the present interlocutory inquiry only I have assumed merely that the Procurator-General is before the Court as the proper representative of the commissioned captor. I purposely postpone the questions of possible liability of the Procurator-General in case a wilful excess should be proved against the captor, and of the limits within which if at all that liability may be enforceable.

The limitation of actions in the Naval Prize Act, 1864, protects a person acting under the authority or in the execution or intended execution or in pursuance of the Act from liability to any action or proceeding for any alleged irregularity or trespass or other act or thing done or omitted by him under the Act unless the action is commenced or the proceeding brought within six months. Among the provisions of the Act which are material for consideration in this case are s. 16, which provides that every ship taken as prize and brought into port within the jurisdiction of the Prize Court shall forthwith be delivered to the marshal; s. 17, which, read together with s. 31, imposed upon a captor of a ship (or goods) the duty with all practicable speed to bring the ship's papers into the Registry and to make the proper affidavit; s. 18, which provides that as soon as the affidavit as to ship's papers is filed a monition shall issue to show cause

(1) [1920] A. C. 748, 753.

1923

THE WILHELMINA.

The President.

why ship (or goods) should not be condemned; s. 23, which provides for the admission of claims of interest in ship or goods at any time before the final decree in the cause; ss. 26–29, which deal with the sale and custody of proceeds of sale of ships and goods in prize; and s. 32, which gives statutory effect to the old practice whereby a claimant is entitled to have a monition to proceed to adjudication in case a captor shall fail to institute or prosecute with effect proceedings for adjudication. Sect. 55 of the Act of 1864 is also material. It provides that nothing in the Act shall "take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a Prize Court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of Admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exerciseable by a Prize Court." I pause here to say that no action has been taken in this Court—or as it appears, elsewhere—to raise directly the question whether the enactments in ss. 17 to 22 of the Naval Prize Act, 1864, have been obeyed by the captors of the *Wilhelmina*, and that the limitation enacted in the Act of 1893 is now no doubt an effectual bar to any effective proceeding in that behalf. Considerations arise with respect to this matter which are relevant to the question I have to determine. That any statute of limitations extended to any proceeding in prize before the Naval Prize Act of 1864 was not contended. I think it could not be. Lord Stowell's judgments in cases like *The Mentor* (1); *The Huldah* (2); and *The Susanna* (3), make it clear, on the one hand, that the right to prosecute a claim in prize might be lost long before six years had elapsed after its accrual, and on the other hand that it might be brought to hearing long after six years had expired. My reference to six years relates, of course, to the principal limitation in the statute of 21 Jac. 1, c. 16. *The Mentor* (1) was a case where sixteen years had

(1) 1 C. Rob. 179. (2) 3 C. Rob. 235.
(3) (1805) 6 C. Rob. 48.

elapsed between the alleged accrual of the right to claim in prize and the date when a monition to proceed to adjudication was brought before the Court. Lord Stowell dealt with the matter in his judgment in these words: "It is not within my recollection, that a case of such antiquity has ever been suffered to originate in this Court; I do not say that the statute of limitations extends to prize causes; it certainly does not. . . . ." The old rule as to the limitation of claims in prize is summed up in Pratt's edition of Story on Prize, p. 40, and placed upon the grounds of natural justice on which it was no doubt always held to depend.

A certain sense of surprise is inevitable when, at this period in the administration of prize law, after more than eight years of the very active exercise of the jurisdiction in a time when both the Naval Prize Act of 1864 and the Public Authorities Protection Act, 1893, are familiar statutes, the Court is invited to declare that by virtue of provisions in our municipal law any proceeding in prize by a neutral against a commissioned captor in respect of a seizure, detention, or sale of the ship or goods of such a neutral must be taken within six months of the accrual of the right of claim. This fact was among the reasons why I took time to consider my judgment.

Although the matter in question depends upon the construction of an Act of the Imperial Parliament, it seems to me to be of little use to examine decisions of the Courts of municipal jurisdiction in order to ascertain, for example, whether a claim in prize is analogous to an action in rem like that in *The Burns* (1) or to a claim for compensation under a statute, like that in *Delany* v. *Metropolitan Board of Works* (2); or to a claim in respect of a wrongful seizure under a sanitary Act, like that of the *Glasgow Corporation* v. *Smithfield and Argentine Meat Co.* (3); or to an action to restrain a public authority by injunction, like *Fielden* v. *Morley Corporation*. (4) A claim in prize is not a claim under municipal law and cannot be instituted or determined

(1) [1907] P. 137.
(2) L. R. 2 C. P. 532; 3 C. P. 111.
(3) 1912 S. C. 364.
(4) [1900] A. C. 133.

1923

THE WILHELMINA.

The President.

before any municipal tribunal. In *Le Caux* v. *Eden* (1) the Court of King's Bench decided in 1781 in accordance with a view often previously declared by Lord Mansfield, that an action will not lie for false imprisonment where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted. Buller J. explained the decision in a famous judgment. Lord Mansfield, as the learned reporter says, " did not go into the argument at large, but adhered to the opinion he had so repeatedly and peremptorily given at Nisi Prius; and probably thought it more decent to leave the discussion of it to the other judges." It was held by the Court of King's Bench in 1789 in *Smart* v. *Wolff* (2) that where there is a question of prize a Court of common law cannot even take cognizance of a claim for freight. The ground of this judgment was that even the demand of freight " involves in it the question of prize, and whether or not the goods are contraband, and many other questions . . . . all which must be subjected to the decision of some forum, governed by the same law in all countries."

In any other Court than a Court of prize a commissioned captor would seem to have no need of the protection of statutes of limitation against civil proceedings for any act done by him in good faith under his commission, unless a thing done or omitted contrary to the statutory directions in the Naval Prize Act, 1864, could be made the subject of proceedings under municipal law. As to that I need not pronounce any opinion. The suppositious case of a wilful abuse of armed power by a commissioned captor need not be separately considered, for there certainly is jurisdiction in prize to deal with such a case, and so far as I know no authority to deal with it elsewhere. I assume for the purposes of to-day that an action or proceeding in respect of such an abuse of power would be no less and no more within the provisions of the Public Authorities Protection Act, 1893, than any other action or proceeding in prize by a neutral claimant.

(1) (1781) 2 Doug. 594, 600. (2) (1789) 3 T. R. 323, 341.

The first question to be considered here is whether, apart from its reference to the Naval Prize Act, 1864, the Public Authorities Protection Act, 1893, could be held to extend to proceedings in prize. This cannot be determined, in my view of the matter, upon a mere consideration of words, as, for example, by construction of the words "action or other proceeding" in the Act of 1893 in the light of the definitions in the Judicature Act, 1873. Nor does the fact that the present proceeding was commenced by a writ carry the argument further. That is matter of form. What is to be regarded is the scope and intended operation of the statute. The prime characteristics of the jurisdiction in prize are first that it is exercised by a tribunal deemed by common consent of the civilized States of the world to be invested with authority to determine the rights of the subjects of any of them in respect of claims which arise out of captures at sea in the exercise of belligerent rights, and, secondly, that it is governed by international law. In the words of the Commission which before 1864 conferred the jurisdiction in prize in this country, the Court is "to proceed upon all and all manner of captures seizures prizes and reprisals of all ships and goods that are or shall be taken; and to hear and determine according to the course of Admiralty and the law of nations." This ancient jurisdiction is embodied in the statutory powers of the Court as defined by the Naval Prize Act, 1864.

The position and functions of the Prize Court as a tribunal which administers international law in questions of belligerent right arising between its own State and foreign States and persons was considered in the Privy Council in *The Zamora* (1), and is discussed in the judgment there delivered by Lord Parker: "Of course the Prize Court is a municipal Court" —Lord Parker said—"and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal law and international law is well defined. A Court which administers

(1) [1916] 2 A. C. 77, 91.

1923

THE WILHELMINA.

The President.

municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relation towards each other or in express international agreement."

To determine the scope and intent of the Public Authorities Protection Act, 1893, with regard to the "action or proceeding" here in question it is necessary to bear in mind a principle of construction of statutes long established in our municipal law—namely, that prima facie the British Legislature is deemed to legislate only with regard to the rights and duties of subjects of the British Crown. Lord Hatherley, when he was Sir William Page Wood, in *Cope* v. *Doherty* (1), defined this principle, which, as he held, "renders it proper for every Court of Judicature"—in this country—"in construing the enactments of any Legislature, to presume, prima facie, and, unless the contrary be expressed, or be implied from the absolute necessity of the case, that such Legislature intended by its enactments to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights." Lord Hatherley thus adopted and applied a judgment of Dr. Lushington in *The Zollverein* (2), where the same principles had been invoked in order to determine whether by a statute relating to the Instance jurisdiction in Admiralty the British Legislature could be deemed by an enactment in general terms to have restricted the privileges which foreign owners enjoy under the general law of nations. That the effect of statutes of limitation as between litigants before municipal tribunals is deemed to be among the matters of procedure which are governed by the lex fori is not, I think, a relevant consideration in the present inquiry. Prof. Albert Dicey says in his treatise on the Conflict

(1) (1858) 4 K. & J. 367, 390. (2) (1856) Swa. 96.

of Laws, 2nd ed., p. 708, that while the principle that procedure is governed by the lex fori is of general application and universally admitted, it extends in its general acceptance only to proceedings under the law of this country by which the restriction upon the right of suit is imposed.

Reading the Public Authorities Protection Act, 1893, with due regard to its purport and scope I am of opinion that it was primarily designed to deal, as it does effectually deal, with actions brought and proceedings taken in English municipal Courts by public authorities and persons acting or purporting to act under public authority in England, and that it ought not to be held to apply to the claim here in question unless its provisions show an unmistakable intention to that effect. To quote from Dr. Lushington's judgment in *The Zollverein* (1) there must be words "so clear that there can by no possibility be a mistake." But if there be found in the Public Authorities Protection Act, 1893, a clearly expressed intention to include proceedings in prize within the limitations there enacted by the Legislature, I have no other duty in the matter than to give effect to the Act. In the course of giving judgment in *The Zamora* (2) Lord Parker declared the law thus: "It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper functions as a Prize Court." This last-mentioned conclusion strongly emphasizes in my mind the importance of a careful examination of the statute now in question. The express provision in the Public Authorities Protection Act, 1893, which is relied upon as showing an intention in the Legislature to include proceedings in prize within the limitations established by

(1) (1856) Swa. 96.

(2) [1916] 2 A. C. 77, 93.

1923

THE WILHELMINA.

The President.

the Act, is the provision in s. 2. This section repeals "so much of any public general Act as enacts that in any proceeding to which this Act applies . . . . the proceeding is to be commenced within a particular time," and in particular "The Naval Prize Act, 1864—in part, namely s. 51." Sect. 51 of the Act of 1864 contains the limitation of actions which I have already cited. The words in the Act of 1893 which are to be considered are those then which impliedly, if not explicitly, describe an "action or proceeding" such as is specified in the Naval Prize Act, 1864, s. 51, as a proceeding to which "this Act"—the Act of 1893—applies. It was argued by the Attorney-General that the words I have cited must be so construed as to bring within the limitation in the Act of 1893 any proceeding in prize against a commissioned captor, and by consequence, if not a fortiori, any proceeding in prize against the Procurator-General.

Now the limitation in the Act of 1864 for which the general provision of the Act of 1893 has been substituted was a limitation only upon actions and proceedings for things alleged to be done or omitted under the Act of 1864. That Act, with its various regulations as to things to be done in prize, no doubt imposes some statutory duties upon captors as I have already indicated, as well as upon persons concerned in the matters of administration which the statute regulates. It does not, however, purport to deal with the substantive law of prize, the right of capture, and the relative interests of captor and claimant in captured goods. Sect. 55 of the Act indeed expressly provides that Courts of prize shall "as heretofore" take cognizance of and judicially proceed upon any capture, seizure, prize or reprisal and hear and determine the same according to the course of Admiralty and the law of nations. How and where an action or proceeding for breach of duty under the Act of 1864 may be judicially dealt with it is not necessary to determine, though it may well be considered that prima facie such a delinquency falls to be adjudicated upon in a municipal Court. At any rate, the statutory limitation upon such an action or proceeding which was expressed in the Act of 1864 is not a limitation upon

a proceeding in prize, and the Act of 1893 does not in terms alter its character or extend its operation. Since the Naval Prize Act, 1864, did not introduce any limits of time for proceedings in prize, properly so called, and the Public Authorities Protection Act deals expressly with the limitation in that statute, and does not in express terms extend its scope, and is not primarily or specifically an Act to alter the law of prize, I am satisfied that the Legislature did not intend to make and has not by the Act of 1893 made the drastic change in the law of prize which has been contended for on behalf of the Crown in this case.

Whether the plaintiffs have been guilty of delay which ought on equitable grounds to bar their claims; and whether the captor as represented by the defendant has been prejudiced by the delay which has occurred so as to be entitled to be relieved from making any answer on the merits of these claims, are not among the material questions now to be determined. Nor have I to decide whether any innocuous lapse of time would have been an answer without more to a claim by the plaintiffs for a monition to the defendant as representing the captor of the *Wilhelmina* to proceed to adjudication. That matter, which was mentioned at the hearing, can be dealt with if and when it arises.

Upon the point of law raised by para. 4 of the answer the plaintiffs are entitled to succeed.

Solicitors for the plaintiffs: *Cattarns & Harris.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. M. T.

1923
March 19.

DIVORCE.

SMITH *v.* SMITH.

Practice—Costs—Act on Petition by Husband denying Jurisdiction—Liability to pay and give Security for Wife's Costs of Act on Petition.

A husband cannot refuse to pay and give security for his wife's costs of divorce suit or Act on Petition on the ground that he disputes the jurisdiction. A husband who appears under protest to a wife's petition and disputes the jurisdiction on the ground of his having a foreign domicil may be ordered to pay his wife's costs of suit up to the setting down of the Act on Petition and to give security for her costs attendant on the Act on Petition.

THE parties to this action were married in England. On October 12, 1922, the wife filed a petition for divorce on the ground of her husband's statutory desertion and adultery. The husband appeared under protest, and on November 1, 1922, filed an Act on Petition alleging that he was domiciled in Scotland, and denying the jurisdiction of the English Court. On November 28 the wife filed an answer to the Act on Petition alleging that her husband was domiciled in England. The husband replied, and the Act on Petition was set down for hearing. The wife applied to a registrar for an order for payment of her costs of the suit up to the setting down of the Act on Petition. The registrar made the order, but gave the husband fourteen days to appeal. The appeal of the husband to the judge against this order was heard in chambers, but was adjourned into Court for judgment.

D. Cotes-Preedy for the wife.
Frampton for the husband.

HILL J. The question which arises in this case is as to the wife's costs of the suit up to the date when the Act on Petition was set down and as to her right to security for the costs in relation to her husband's Act on Petition disputing the jurisdiction of the Court. The registrar has made an order that the husband shall pay the wife her costs of the suit up to the setting down of the Act on Petition and shall

find security for her costs to be incurred in connection with the Act on Petition. The order fixed the amount of these costs, but directed that it should not be drawn up for fourteen days to allow time for an application to the Court. The husband contends that as he has appeared under protest he cannot be ordered to pay or give security for costs until the question of jurisdiction to entertain the suit is decided against him.

I find however that the practice has been to order security for the wife's costs in such a case as this. I assumed it to be so myself in the case of *Gran* v. *Gran* (1), where I directed an attachment to issue against a husband for his failure to comply with an order to give security for his wife's costs of a similar Act on Petition. In *Graham* v. *Graham* (2) Horridge J. ordered the husband to pay the wife's costs up to the amount of the security which had been ordered, though he allowed the husband's Act on Petition and dismissed the wife's petition on the ground of want of jurisdiction. I think this sufficiently shows that the Court has jurisdiction to order security notwithstanding that the husband is raising a question as to the jurisdiction of the Court to entertain the suit. I think that an Act on Petition is a stage in the original suit within Divorce Rule 158, and comes within the general rule about costs. The husband's appeal against the registrar's order must be dismissed with costs.

Solicitors for petitioner : *Kimber Bull, Howland, Clappé & Co.*
Solicitors for respondent : *W. L. Dell & Co.*

(1) Times Newspaper, February 15, March 1 and 19, 1921.
(2) Ante, p. 31.

J. R. B.

1923

Feb. 26, 27; *March* 20.

DIVORCE.

MITFORD *v.* MITFORD AND VON KUHLMANN.

Divorce—International Law—Domicil—Nullity—Marriage in Germany—Husband's Domicil English—Wife's German—Marriage declared Null by German Court—Validity of German Decree in England.

The validity of a marriage between a domiciled Englishman and a woman domiciled in a foreign country, celebrated in that country, is a matter properly cognizable by the Courts of that country. It is perhaps too wide a proposition that the decision of those Courts as to the validity or nullity of such a marriage is for all purposes decisive; but it is too narrow a proposition that it is only decisive as to the mere solemnities of the marriage rite.

The decree of a foreign Court is open to examination. But when that Court has jurisdiction over the subject matter and the parties, and has proceeded in accordance with what in English law are deemed to be the requirements of natural justice, its judgment as to the nullity of a marriage seems to be as conclusive as a like judgment in any other civil proceeding. If the foreign Court has jurisdiction in this sense the English Courts do not inquire whether the jurisdiction is properly exercised. The essentials and mode of coming into operation of the marriage contract are to be judged by the requirements of the law to which in the transaction the parties purport to conform, and are not necessarily uniform with those of the law of the domicil.

If a domiciled Englishman consents to be married to a German woman by a form good in German law, but not good in English law, he must be taken to have submitted to the German law in all matters relating to the marriage, and cannot complain if the marriage is afterwards declared null on grounds which are good according to German law, though immaterial in English law.

Husband's petition for divorce on the ground of his wife's bigamy and adultery.

The petitioner and respondent were married in Berlin on January 5, 1914, by a ceremony valid in German but not in English law. The husband was domiciled in England, but had for some time resided for considerable portions of each year in Germany. The wife, whose maiden name was von Friedlander-Fuld, was a German subject domiciled before the marriage in Germany. After the marriage the parties travelled together about the Continent and England until the beginning of March, 1914, when they took up their

residence in Berlin. In April of that year the respondent came to the conclusion that she could not live with the petitioner and left him. On June 24, 1914, she filed a petition for a declaration of nullity of the marriage. The husband appeared, and on October 23, 1914, the Berlin Court (i.e., the 34th Civil Chamber of the Royal Provincial Court of Berlin) declared the marriage null and void on the ground of error under art. 1333 of the Civil Code of Germany, which, according to an official translation, enacts: "That the validity of a marriage may be disputed by a spouse who at the time of contracting the marriage was mistaken as to the person of the other spouse or as to such personal attributes of the other spouse as would have prevented him or her, with knowledge of the state of affairs and with the intelligent appreciation of the significance of the marriage, from contracting the marriage." The particular personal attributes on which the decision was founded were not discussed in the English Court; they were denied by the husband and could not have been pleaded as a ground of nullity according to English law.

The husband appealed to the Appeal Court in Berlin on February 26, 1916; that Court affirmed the decree of nullity. He brought a further appeal to the Imperial Supreme Court at Leipzig, but the original decree was again affirmed.

On March 4, 1920, the respondent was married in Germany to Richard von Kuhlmann, a German citizen, with whom she lived up to the date of this petition. On March 3, 1921, Mitford brought this petition for a divorce on the ground that the first marriage was still subsisting according to English law. The wife filed an Act on Petition, alleging that the decree of nullity in the German Court was binding according to English law, and her subsequent marriage valid. Mitford, in answer to the Act on Petition, alleged that his wife on her marriage acquired an English domicil; that no German Court had power to declare the marriage null and void; and that the decree of nullity was granted upon false evidence at a time when Germany was at war with England; and that owing to the state of war the petitioner was unable to attend in the suit and deny the allegations against him.

1923

MITFORD v. MITFORD.

Sir Ernest Pollock K.C. and *Noel Middleton* for the Act on Petition. The marriage of the petitioner and respondent was contracted in Germany and in German form and has been declared null by a German Court having jurisdiction in the matter. The Court which decides whether the parties are in a position to contract must be the Court of the place where the knot is tied. The law everywhere requires volition of the parties. The German law provides that there is no volition where one party is ignorant of important facts. On this point the lex loci contractus must prevail and the English Courts will accept the decision of the local Court: *Scrimshire* v. *Scrimshire* (1); *Dalrymple* v. *Dalrymple* (2); *Sinclair* v. *Sinclair* (3); *Simonin* v. *Mallac.* (4)

In cases of nullity it is residence and not domicil which is the ground of jurisdiction: *Roberts* (*falsely called Brennan*) v. *Brennan* (5); *Bater* v. *Bater.* (6) In *Ogden* v. *Ogden* (7) the English Court held that a marriage celebrated in England, where one of the parties was domiciled in England and the other in France, could not be dissolved by a French Court on a ground not recognized in England. That is a strong instance of the rule that lex loci contractus must prevail. The parties to a contract of marriage must be assumed, as in any other contract, to have intended to adopt the law of the country where the contract was made: *Warrender* v. *Warrender.* (8)

When a competent foreign Court having jurisdiction has pronounced a decision, this Court cannot look at any alleged defects in procedure or evidence: *Pemberton* v. *Hughes.* (9)

[They also referred to *Hay* v. *Northcote.* (10)]

Bayford K.C. and *T. Bucknill* for the petitioner. There is no case which decides that a foreign decree of nullity of marriage without more is binding on this Court. There is a great difference whether the decree of nullity is on grounds which show the marriage to have been absolutely void or only

(1) (1752) 2 Hagg. Con. 395, 407.
(2) (1811) 2 Hagg. Con. 54, 59.
(3) (1798) 1 Hagg. Con. 294.
(4) (1860) 2 Sw. & Tr. 67.
(5) [1902] P. 143.
(6) [1906] P. 209.
(7) [1908] P. 46.
(8) (1835) 2 Cl. & F. 488, 528, 529.
(9) [1899] 1 Ch. 781.
(10) [1900] 2 Ch. 262.

voidable. If it is void, as where one party has a spouse living, or the ceremony is a mere fraud, the marriage is void from the beginning and the wife does not acquire her husband's domicil: *Turner* (*falsely called Thompson*) v. *Thompson*. (1) If it is set aside for a cause of which only one of the parties can complain, as, for example, impotence, the marriage is only voidable; and in such a case the wife does acquire her husband's domicil, and after that only the Court of the domicil can declare the marriage null.

The lex loci contractus only applies to the form of marriage.

[THE PRESIDENT. Is that consistent with *Scrimshire* v. *Scrimshire*? (2)]

That case was dealing with a marriage void ab initio. It all turned on the form of the marriage ceremony.

Sinclair v. *Sinclair* (3) shows that it is going too far to say a decree of nullity is universally binding.

In *Brook* v. *Brook* (4) the House of Lords decided that the form of marriage is a question for lex loci; its validity is a question for the law of the domicil.

If the marriage is only voidable the wife acquires her husband's domicil, and the validity of the marriage is decided by the law of domicil: *Sottomayor* (*otherwise De Barros*) v. *De Barros* (5); *In re Cooke's Trusts* (6); *In re Alison's Trusts*. (7)

Noel Middleton in reply. None of the cases cited mention any such distinction between void and voidable marriages as is suggested. There was not here any question as to the personal capacity of the parties, or as to such misrepresentation as the case of *Moss* v. *Moss* (8) shows may in some States of America invalidate a party's consent.

Scott (*falsely called Sebright*) v. *Sebright* (9) and *Ogden* v. *Ogden* (10) show a strong tendency in late times in the English Courts not to allow English decisions to be interfered with

(1) (1888) 13 P. D. 37.
(2) 2 Hagg. Con. 395.
(3) 1 Hagg. Con. 294.
(4) (1861) 9 H. L. C. 193.
(5) (1877) 3 P. D. 1.
(6) (1887) 56 L. J. (Ch.) 637.
(7) (1874) 31 L. T. 639.
(8) [1897] P. 263.
(9) (1886) 12 P. D. 21.
(10) [1908] P. 46.

1923

MITFORD v. MITFORD.

by foreign Courts. As a matter of reciprocity their decisions ought to be recognized here.

The plaintiff deliberately chose to be married according to German law, though he might have taken advantage of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), and have been married before the Consul according to English law, and he must abide by the result.

Cur. adv. vult.

March 20. THE PRESIDENT (SIR HENRY DUKE). On the authority of a long series of decisions extending from *Scrimshire* v. *Scrimshire* (1), determined in the Consistory Court of London in 1752, to *Ogden* v. *Ogden* (2), decided in the Court of Appeal in 1908, counsel for the respondent supported the Act on Petition upon the broad grounds that the validity of a marriage solemnized in Germany according to German law is a matter properly cognizable by German tribunals, that the petitioner had not only appeared in the German proceedings and submitted to the jurisdiction of the German Courts but had taken part in the three successive hearings of the cause, and that the result arrived at in the proceedings ought to be accepted here.

Counsel for the petitioner contended that, although the judgment of a foreign Court with regard to the validity or nullity of a marriage ceremony solemnized within its jurisdiction is, or may be, conclusive as to matters of mode and form, such a judgment is open to review where there are questions of the competency of the parties, of the efficacy of the marriage ceremony, and of the effect upon the marriage contract of the law of domicil of the parties or either of them. In particular, Mr. Bayford relied upon domicil as a decisive fact in the case of an Englishman to determine the effect for him of a lawful marriage contract, wherever celebrated. Shortly, the argument amounted to this, that an Englishman who contracts marriage abroad becomes thereupon necessarily and inevitably endued in relation to his wife with the same status and the same legal capacities and incapacities as an

(1) 2 Hagg. Con. 395. (2) [1908] P. 46.

English husband who marries in England an English wife. It was accordingly contended that a decree of nullity of marriage could only be made in the case of an English husband for causes recognized by English law. Counsel for the petitioner also impugned the German decree of nullity on the ground of the prosecution of the respondent's suit during the war, when, as was said, the petitioner, by reason of his British nationality, could not be heard in person before a German tribunal.

That the Courts duly authorized by any State may determine the validity of the marriage of persons resident within and subject to their jurisdiction was not disputed. The law of England is, I think, clear to the effect that they may. An English civil tribunal is competent to determine in a dispute as to succession whether a claimant is the child of a lawful marriage contracted out of England. An English criminal Court can try upon an allegation of a bigamous marriage in England the validity of a marriage previously contracted abroad. This Court also, by virtue of the jurisdiction conferred by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6, is empowered to adjudicate upon an allegation of nullity of marriage in the case of persons within its jurisdiction and to pronounce finally thereon by a decree which concludes the matter between the parties here, and would, I think, be received in evidence elsewhere. As was said by Lord St. Helier in *Roberts* (*falsely called Brennan*) v. *Brennan* (1): "In my view, residence—not domicil—is the test of jurisdiction in a nullity case. The jurisdiction of the Ecclesiastical Courts was based on the residence of the parties, and in suits for nullity this Court follows the practice of the Ecclesiastical Courts, as prescribed by s. 22 of the Matrimonial Causes Act, 1857." The principle which is involved was discussed in *Niboyet* v. *Niboyet* (2) and *Anghinelli* v. *Anghinelli* (3) in the Court of Appeal.

Whether and to what extent a decree of nullity of marriage is binding outside the jurisdiction in which it is

(1) [1902] P. 143, 144. (2) (1878) 4 P. D. 1.

(3) [1918] P. 247.

1923

MITFORD v. MITFORD.

The President.

made is a matter upon which divergent views have been expressed in our own Courts. That the decree of a municipal tribunal applying the municipal law must necessarily be decisive of the validity or nullity of a marriage contracted within its jurisdiction is, I think, too wide a proposition, though a passage was cited from the judgment of Sir Edward Simpson in *Scrimshire* v. *Scrimshire* (1) which might seem to suggest such a conclusion: "All nations," said the learned judge, "allow marriage contracts; they are juris gentium, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion, that must necessarily arise to the subjects of all nations, with regard to legitimacy, successions and other rights if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made." References to cases like *Brook* v. *Brook* (2); *Sottomayor* (*otherwise De Barros*) v. *De Barros* (3); and *Ogden* v. *Ogden* (4), show that the consent to Sir Edward Simpson's proposition in *Scrimshire* v. *Scrimshire* (5) is less general than the language of his judgment suggests. Lord Cranworth in *Brook* v. *Brook* (2) expressed the principle of the rule under our own law in these words: "Though in the case of marriages celebrated abroad the lex loci contractus must quoad solennitates determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of Her Majesty domiciled in this country, might lawfully make." The dicta cited from *Scrimshire* v. *Scrimshire* (5) are, I think, too wide, and the rationes decidendi in *Brook* v. *Brook* (2) too narrow to be used textually to determine the main question in this case.

As appears from the judgment in *Scrimshire* v.

(1) 2 Hagg. Con. 395, 417.
(2) 9 H. L. C. 193, 224.
(3) 3 P. D. 1.
(4) [1908] P. 46.
(5) 2 Hagg. Con. 395.

1923

MITFORD v. MITFORD.

The President.

Scrimshire (1), and as was said by Lord Stowell in *Sinclair* v. *Sinclair* (2), the sentence of nullity of a foreign Court is not necessarily binding in all Courts. Such a decree is, at any rate, examinable in other jurisdictions. But when the validity of a marriage arises for determination in a Court which has jurisdiction over the subject matter and over the parties, and which proceeds in accordance with what, in English law, are deemed to be the requirements of natural justice, the judgment pronounced there would seem to be as conclusive as a like judgment in any other civil proceeding. Lindley M.R. in *Pemberton* v. *Hughes* (3) in the Court of Appeal, stated the law in these terms: "Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

In the discussion before me marriage was sometimes spoken of as though every ceremony of marriage must necessarily and universally take effect with the same finality at the moment of solemnization. It seems to me, however, that this assumption ignores the differences there are in the marriage ceremonies of different countries. The point of time at which marriage is definitively contracted so that there is thenceforward union of the parties, as is said in the cases, "for life" must evidently be determined by the provisions of the law under which the solemnity is conducted. In the remarkable case of *Dalrymple* v. *Dalrymple* (4) which deals with Scottish marriages per verba de præsenti, Lord Stowell found it necessary to determine the point of time at which marriage would be contracted under various

(1) 2 Hagg. Con. 395.
(2) 1 Hagg. Con. 297.
(3) [1899] 1 Ch. 781, 790.
(4) 2 Hagg. Con. 54, 121.

1923

MITFORD v. MITFORD.

The President.

customary forms of Scottish marriage. The case arose between a man claiming English domicil and a woman domiciled in Scotland, but domicil was not, I think, a material consideration. The validity of the matrimonial rights claimed by the party, Lord Stowell said, "must be tried by reference to the law of the country where, if they existed at all, they had their origin." He proceeded to ascertain the requisites of Scottish law in respect of consent of the parties, the effect of mutual declarations of consent and the time at which such declarations take effect, so that marriage is deemed to be then contracted. Preparatory to his decision of the question whether there existed a valid and conclusive consent of each of the parties to the marriage contract which was alleged, Lord Stowell said (1): "When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract." In the event he held that the mutual promises of the parties were unqualified, and that a valid marriage was concluded when the mutual promises were exchanged. The case illustrates the proposition that the essentials and mode of coming into operation of a marriage contract are to be judged by the requirements of the law to which in the transaction the parties purport to conform, and are not necessarily uniform with those of our own law.

The first question in the present case is that of the effect according to English law of the ceremony solemnized at Berlin between the petitioner and the respondent on January 5, 1914. What was done appears by the certificate. The ceremony clearly was not such as to constitute marriage according to the English common law or under any English statute. Its validity depended upon the German Civil Code, and I am bound to conclude that the petitioner and the respondent intended to contract marriage in accordance with the provisions of that Code. Having regard to the language of Article 1333, one term incorporated by German law in the marriage contract—unless the law of the petitioner's domicil prevents it—was that the validity of the intended marriage

(1) 2 Hagg. Con. 54, 104.

might be disputed by either of them if he or she at the time of marriage was mistaken as to such "personal attributes of the other spouse as would have prevented him or her with knowledge of the state of affairs and with appreciation of the essential significance of the marriage from contracting the marriage." The respondent has satisfied the German Courts that she was so mistaken. In English law the mistake, if it existed, would be immaterial. Under German law it avoids the contract as effectually as a mistake of identity. It is said on the petitioner's behalf that this effect is excluded in this case by the law of his domicil, and at the hearing the observation was added, citing in a popular sense some words of Cotton L.J. in *Sottomayor* (*otherwise De Barros*) v. *De Barros* (1): "No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects." Reliance was placed by counsel not only upon the effect of the petitioner's English domicil but upon a contention that the respondent's domicil at the time she commenced her suit was, as a matter of law and in fact, that of the petitioner. As to domicil by operation of law, to say that the respondent on January 5, 1914, became domiciled in England "by marriage" seems to me to beg the question. It assumes in the petitioner's favour the subject matter of the controversy. As to domicil in fact, some observations of Lord Hannen in *Turner* (*falsely called Thompson*) v. *Thompson* (2) were relied upon. Lord Hannen said there with regard to a voidable marriage that: "A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicil of her husband if she lives with him in the country of his domicil." Issues of fact must, I suppose, be decided in every case upon what is there alleged and proved. In this case the respondent never lived with the petitioner in the country of his domicil. Nor can I say with confidence as to the respondent, as was said by Lord Hannen of the petitioner in *Turner* (*falsely called Thompson*) v. *Thompson* (2), and her husband: "She had the intention of taking up her permanent abode

(1) 3 P. D. 1, 7. (2) 13 P. D. 37, 41.

1923

MITFORD v. MITFORD.

The President.

with him, and of making his country her permanent home." So far as domicil is concerned, the question of the national law to be applied arises only in respect of the domicil of the petitioner, and the facts are less strong in favour of the petitioner's argument than were the facts in *Scrimshire* v. *Scrimshire* (1), where both parties were resident in England. Yet Sir Edward Simpson, speaking in that case with direct regard to the French prohibition of clandestine marriages, but expressing his opinion in general terms, said (2): "As both the parties by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be, that it should be a marriage, or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage, or contract, 'ad aliud examen,' to be tried by different laws than those of the place where the parties contracted." The reasons of the conclusion thus expressed seem to me to apply with full force in the present case.

Lord Gorell in *Chetti* v. *Chetti* (3) dealt with a case which is in some respects the converse of this. The petition in *Chetti* v. *Chetti* (3) was that of an English woman married in London to a native of India. The respondent sought to control the marriage contract into which he had entered here by what he alleged to be the law of his domicil. Dealing with that attempt Lord Gorell used this language (4): "Ought he to be allowed to do so? Ought a foreigner domiciled abroad, who comes to this country and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of the foreign domicil to do that which he has done voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our Courts to support

(1) 2 Hagg. Con. 395.
(2) 2 Hagg. Con. 395, 412.
(3) [1909] P. 67.
(4) [1909] P. 87.

such an assertion and repudiation? . . . . To my mind," he said, "the answer should be 'No.'" In *Chetti* v. *Chetti* what was in question was a condition alleged to attach to the marriage contract by virtue of the Indian domicil of the husband. English marriage law was held to exclude it. Here the petitioner claims that a German marriage contract must be governed by the provisions of the law of his English domicil. He says truly that to make this marriage dependent for its validity upon the conformity or disconformity of one of the spouses to the ideals of the other is repugnant to English law. Doubtless a promise to such an effect upon the occasion of an English marriage would be void, whether the marriage should take place in this country or be solemnized abroad, under the provisions of the Foreign Marriage Act, 1892. The marriage in this case, however, must be judged by the German law under whose sanction it was made.

What remains for consideration is whether the judgment given in the respondent's favour in the Court at Berlin in October, 1914, and confirmed upon successive appeals, is of binding effect here. This inquiry depends upon the compliance or non-compliance of the judgment with the three conditions stated by Lindley M.R. in *Pemberton* v. *Hughes*. (1) As to the general competence of the Court in Berlin to deal with a suit for nullity, no question was raised. As to the validity of its summons to the petitioner it can only be said now that, having been served within the jurisdiction, he appeared and defended the suit. As to observance of the requirements of natural justice, two grounds of objection were insisted on before me; the application of the German Code in relation to the matrimonial affairs of an Englishman and the refusal of the tribunal to adjourn the proceedings during the war until upon the restoration of peace the petitioner could be personally heard. The first of these topics is, I think, outside the meaning of Lindley M.R.'s declaration. It relates to the grounds in law of the judgment. The second is a weighty complaint in respect of procedure, but nothing was adduced which satisfies me that the procedure followed was not within the competence of the Court

(1) [1899] 1 Ch. 781.

1923

MITFORD v. MITFORD.

The President.

in Berlin under the law and practice by which it is—or was—governed, and it must further be said that when adjournment was refused the petitioner proceeded with his defence of the suit and that his averments as to the matters of fact which were in question and the evidence of various witnesses whom he tendered, form parts of the material upon which the judgments of the German Courts expressly purport to proceed. The petitioner's real ground of challenge seems to me to be that embodied in the contention which was put forward on his behalf that the decision was wrong on the merits. Into that question I am, as I think, not entitled to go. According to what I suppose to be well-established principles, I must hold the judgment to be a conclusive adjudication between the parties as to the validity of the marriage of January 5, 1914. I therefore find for the respondent upon the Act on Petition and declare that no marriage was at the commencement of this suit, or now is, subsisting between the petitioner and the respondent.

The order dismissing the Petition will declare that there is no valid marriage subsisting between the parties. As to costs the petitioner must pay them.

Solicitors for the husband: *Francis & Johnson.*
Solicitors for the wife: *Lewis & Lewis.*

J. R. B.

Applied. O'NEILL *v.* O'NEILL. [1949] 2 All E.R. 649.

1923

March 26, 28; *April* 17.

DIVORCE.

KENT *v.* ATKINSON.

Divorce—Practice—Petition for Damages—Death of Wife before Petition—Claim for Damages a distinct Cause of Action—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 33.

The true construction of s. 33 of the Matrimonial Causes Act, 1857, is that the principles and practice which governed the old common law action for criminal conversation are to apply to the remedy thereby substituted of a husband's petition for damages, except so far as they are contrary to over-riding provisions of the Matrimonial Causes Act.

The petition for damages is independent of, and not ancillary to, a petition for divorce. The death of the wife pending suit did not destroy the cause of action at common law which arose when the wrong was done; and there is no reason why her death before action should have any

different effect. The death of the wife does not therefore prevent the husband filing a petition for damages, unless there are over-riding provisions to be found in the Act. The clauses in s. 33 which require that the petition must be brought by a husband and must be served on the wife, and give the Court control of the application of damages, cannot be regarded as such over-riding provisions. A petition for damages may therefore be presented after the death of the wife.

THE husband and wife were married on April 22, 1898, and lived together until the death of the wife on July 13, 1921. There were nine children of the marriage living at the date of the petition, of whom two had attained the age of twenty-one.

On May 2, 1922, the husband filed this petition for damages only, alleging that the respondent had frequently committed adultery with the wife in the years 1918, 1919, and 1920. The wife had confessed the adultery shortly before her death, but there was no suggestion of condonation.

The respondent by his answer, dated October 4, 1922, denied the adultery and pleaded that the Court had no jurisdiction to entertain the suit, the wife of the petitioner being dead before its commencement.

On March 19, 1923, Hill J. made an order that the issue raised by the answer should be tried in Court on March 26. The case was argued on March 26 and 28.

Bayford K.C. and *Bucknill* for the respondent. The whole question in this case is whether the claim for damages survives after the death of the wife, and can be claimed in a petition presented after her death. The action for criminal conversation is abolished by s. 69 of the Act of 1857, and that section was repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); but the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. 2, provides that where any Act passed after the commencement of this Act repeals any other enactment the repeal shall not (*a*) "revive anything not in force or existing at the time at which the repeal takes effect." Therefore the only right of damages remaining is that given by s. 33. (1) That section gives the right to present

(1) Matrimonial Causes Act, 1857, s. 33: "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or

1923

KENT v. ATKINSON.

a petition to any husband and requires it to be served on the wife. In this case the petitioner is no longer a husband. An application has been made for leave to dispense with service on the wife, but leave was refused on the ground that service was impossible. (1)

In *Bernstein* v. *Bernstein* (2) the Court of Appeal held that a claim for damages failed when the petition was dismissed because the adultery had been condoned; though condonation was no defence to the common law action for criminal conversation. That is a clear decision that the claim for damages is ancillary to the petition for divorce and fails with it.

In *Monsell* v. *Monsell and Cain* (3) the wife died after decree nisi had been made and the damages paid into Court, and the Court refused to pay them out again.

In *Cox* v. *Cox and Warde* (4) it was held that where the husband had committed a matrimonial offence which would give the Court discretion to refuse a decree for dissolution, he was debarred from recovering damages.

The whole scheme of the Act of 1857 is dealing with the rights of husband and wife, and the words of s. 33, and especially the power given to the Court to dispose of the

in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

(1) (1922) 127 L. T. 559.
(2) [1893] P. 292, 306.
(3) [1922] P. 34.
(4) [1906] P. 267.

damages in favour of the children or wife, show that it was never intended to give damages to a widower.

Darnley Clifton and *T. M. Hopkins* for the husband. Sect. 33 provides that the claim given to the husband by that section shall be tried on the same principles, in like manner and subject to the same or the like rules and regulations as actions for criminal conversation. Before the Act damages could be and were given after the death of the wife : *Wilton* v. *Webster*. (1) There the action was commenced before the death of the wife, but she died before judgment ; and Coleridge J. said that the death of the wife must be taken into account in the estimate of damages. It is plain that the result would have been the same if the action had been commenced after her death. The wife was never a party to the action for criminal conversation.

In Roscoe's Nisi Prius Evidence, 1849 ed., p. 487, it is stated that in an action for trespass or case for criminal conversation the plaintiff must prove (1.) the marriage, and (2.) the fact of adultery, and that is all. In Bishop on Marriage and Divorce, 6th ed., 1881, vol. ii., § 724, it is stated : " The marriage dissolution does not take away the husband's suit for seducing the wife while the coverture existed." The right arises at the time of the injury, that is the adultery : *Macfadzen* v. *Olivant* (2) ; *Ramsden* v. *Ramsden and Luck*. (3) In the latter case Hannen P. suggested that the fact that the wife might be dead was one of the reasons for allowing the husband to petition for damages only.

A claim for damages does not always stand or fall with a petition for divorce even if joined with it. In *M.* v. *M. and A.* (4) it was held that the right was not lost by the death of the wife after petition brought ; and in *Stocker* v. *Stocker, Brice and Patterson* (5) it was held that the claim for damages against one co-respondent was not abated by a decree made in the same petition for dissolution of the marriage on the ground of the wife's adultery with the other.

(1) (1835) 7 C. & P. 198.
(2) (1805) 6 East, 387.
(3) (1886) 2 Times L. R. 867.
(4) (1910) 26 Times L. R. 305.
(5) [1917] P. 264.

1923

KENT v. ATKINSON.

The word "husband" does not necessarily imply that he has a wife alive. The word "wife" is used in the Act of 1857, and in the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), to include a divorced or separated or deceased wife, and "husband" includes the husband of any of these.

Even in a will the word "husband" has been held to include a husband of a deceased wife whom he had divorced: *Bullmore* v. *Wynter*. (1)

Bayford K.C. in reply.

Cur. adv. vult.

April 17. HILL J. The question at present in issue is whether such a claim, brought after the death of the wife, is sustainable or not.

Except to the parties this is a question of very little importance. So far as is known no such claim has ever been brought before, and it is not a sort of claim which many men are likely to want to bring. It is however a question of some difficulty. It turns on the interpretation of s. 33 of the Matrimonial Causes Act, 1857. By that Act Parliament abolished the old action of criminal conversation, and remodelled the law applicable to claims for damages for adultery (per Lindley L.J. in *Bernstein* v. *Bernstein* (2)), and made them cognisable only by the Divorce Court. [His Lordship read s. 33 of the Matrimonial Causes Act, 1857, and continued:] As I understand the decisions the effect is this. You have to read into the section the principles of the common law as to actions for criminal conversation, and then strike out so much of them as are inconsistent with the provisions of the Divorce Acts which are to be regarded as overriding provisions. Thus no claim for damages can be maintained if the adultery has been condoned, for s. 30 overrides the common law principle: *Bernstein* v. *Bernstein* (3); nor can it be maintained if the adultery is one to which a discretionary bar applies, and the discretion is not exercised in favour of the petitioner: *Cox* v. *Cox and*

(1) (1883) 22 Ch. D. 619. (2) [1893] P. 292, 318.
(3) [1893] P. 292.

1923

KENT v. ATKINSON. Hill J.

Warde (1), for s. 31 overrides any inconsistent common law principle.

The issue in the present case therefore depends on two questions: (1.) according to the principles of the common law could an action for criminal conversation have been maintained by writ issued after the death of the wife? (2.) if it could, are there overriding provisions of the Divorce Acts which say that it cannot be maintained?

As to (1.), the action was for a wrong done, and the cause of action arose when the wrong was done. It was a personal action, such as died with the person; but the persons concerned were the wronged husband and the wrongdoer, the adulterer. The wife was only the means whereby the wrong was done; and there was no more reason why the cause of action should die with the death of the wife when the wrong was adultery than there is reason why the cause of action should die with the death of the wife where the wrong was negligence causing damage. In neither case could the death of the wife give any cause of action at common law. But negligence causing damage to the husband between the injury to the wife and her death gave a cause of action unaffected by the death of the wife before action brought: *Baker* v. *Bolton* (2); just as it did in the case of a servant: *Osborn* v. *Gillett* (3); *Clark* v. *London General Omnibus Co.* (4)

The matter is, I think, really decided by *Wilton* v. *Webster*. (5) If the death of the wife pending suit did not destroy the cause of action but only went in mitigation of damages, I can see no reason for saying that the death of the wife before action brought had any different effect.

As I have referred to the analogy of actions for negligence causing damage, it is well to point out that Lord Campbell's Act has no application to an action for damages by adultery, for the act or default would not have entitled the wife (if death had not ensued) to maintain an action.

(2.) There is no doubt that under s. 33 the husband can

(1) [1906] P. 267.
(2) (1808) 1 Camp. 493.
(3) (1873) L. R. 8 Ex. 88.
(4) [1906] 2 K. B. 648.
(5) 7 C. & P. 198.

1923

KENT v. ATKINSON.

Hill J.

bring a petition for damages as an independent proceeding and not merely as a proceeding ancillary to a petition for divorce or judicial separation. The section expressly so provides. It has been decided that if the wife and co-respondent are served and the wife dies pending suit, the petition for damages can still be maintained: *M.* v. *M. and A.* (1) It has also been decided that if the wife and two co-respondents are served and damages are claimed against the first co-respondent, and a decree nisi is pronounced on the ground of adultery with the second co-respondent, the case against the first co-respondent standing over, the petitioner is still entitled to prosecute his claim for damages against the first co-respondent: *Stocker* v. *Stocker, Brice, and Patterson.* (2)

It has been decided that if a decree nisi is obtained and damages given against the co-respondent, and he pays them into Court and the wife thereafter dies, the Court can still deal with the damages: *Monsell* v. *Monsell and Cain.* (3)

In all these cases the wife was living at the date of the petition and was served. They are authorities for saying that the suit for damages is not abated by the death of the wife. They do not finally determine that the suit can be instituted after the death of the wife.

If s. 33 is inconsistent with the former common law principle, it is because it says: (1.) any husband may petition; (2.) the petition shall be served on the wife; (3.) the damages recovered are placed under the control of the Court. And it is argued that the Act in s. 33 and elsewhere contemplates a husband and a wife both living at the institution of the suit. I do not pretend that the point is not difficult. But I have come to the conclusion that the Act is not so clearly inconsistent with the common law principle as to override it. "Husband" is in the Act sometimes used to include one who was a husband—e.g., in s. 32 (since repealed), as in its substitute, the Act of 1907.

I think it follows from the cases I have cited that if the husband obtained a decree absolute on ground of adultery

(1) 26 Times L. R. 305. (2) [1917] P. 264.
(3) [1922] P. 34.

1923

KENT v. ATKINSON.

Hill J.

with a man unknown, and afterwards discovered the adulterer, he could bring a petition for damages, serving the adulterer and the woman he had divorced; if so, "wife" is used to include one who was a wife.

Then is service on the woman a condition? Service on the wife was an innovation upon the common law. The Court can dispense with it if the woman is alive. I cannot bring myself to think that because the course of nature has made service on the woman impossible, therefore the suit cannot be maintained. The death of the wife makes it impossible for the Court to deal with the damages in her favour, but *Monsell* v. *Monsell and Cain* (1) shows that recovered damages can be dealt with, notwithstanding the death of the wife.

I hold that the common law principle is not overridden by any provision of the Acts, and that a suit for damages for adultery can be maintained, notwithstanding the wife is no longer alive at the time of the institution of the suit.

Solicitor for petitioner: *H. Anderson.*

Solicitors for respondent: *Wansey, Stammers & Co.*

J. R. B.

ADMIRALTY.

1923

Feb. 12; *March* 5.

(IN PRIZE.)

In the Matter of THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15 (H.M.S. ESPIÈGLE AND OTHER VESSELS).

Prize Court—Prize Bounty—"Armed ship" of the Enemy—Lighters carrying Troops—Estimate of Numbers of Persons on Board—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42.

By an Order in Council of March 2, 1915, which put into operation s. 42 of the Naval Prize Act, 1864, prize bounty at the rate of 5*l.* for each person on board the enemy's ship was payable to such of the officer and crew of any of His Majesty's ships of war as were present at the taking or destroying of any "armed ship" of the enemy:—

Held, applying the principles stated in *H.M. Submarine E.*14 [1920]

(1) [1922] P. 34.

1923

THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15, *In the Matter of.*

A. C. 403, that it was not necessary for the ship herself to carry any armament structurally attached to her, and that enemy lighters carrying troops armed with rifles were "armed ships" within the meaning of the section.

No accurate figures being available to establish the numbers of the persons on board the enemy vessels, the Court, believing the claimants' estimate to have been made with the intention of accuracy, accepted it.

MOTION for an award of prize bounty in accordance with the provisions of s. 42 of the Naval Prize Act, 1864 (put into operation by an Order in Council of March 2, 1915), on behalf of Captain Wilfrid Nunn, R.N., and the officers and ships' companies of various sloops, launches and other craft, as being present at the capture or destruction of the armed Turkish vessels set out in the following schedule :—

Name of H.M.S. engaged.	Date of capture or destruction.	Name of enemy vessel captured or destroyed.	Number of persons on board enemy vessel.	Amount of Prize Bounty at £5 per head.
				£
H.M.S. *Espiègle*	Nov. 9, 1914	Turkish river gunboat ..	12	60
Do.	Nov. 19, 1914	Do.	12	60
Do.	June 1 and 2, 1915	Turkish gunboat *Marmaris* ..	At least 66	330
H.M.S. *Odin* ..		Turkish armed vessels *Mosul*	,, 230	1150
		and *Bulbul* ..	,, 32	160
H.M.S. *Clio* ..		7 armed Turkish barges ..	,, 714	3570
H.M.S. *Shaitan*		7 armed Turkish mahelas ..	,, 315	1575
H.M.S. *Shaitan*	June 3, 1915			
H.M.S. *Comet* ..		Armed Turkish vessel *Sebah* ..	20	100
H.M.S. *Sumarra*		Armed Turkish vessel *Samarra*	26	130
H.M.S. *Lewis Pelly*		Armed Turkish lighter ..	At least 300	1500
H.M.S. *L.*3		3 other armed Turkish lighters	,, 300	1500
3 armed horse-boats				
H.M.S. *Shushan*..	July 24, 1915	Turkish river gunboat ..	12	60
			Total ..	£10.195

The facts are fully set out in the judgment.

The claim was resisted by the Crown on the ground that the

vessels were destroyed in the course of joint naval and military operations. It was also contended that as it appeared from the claimants' affidavits that some of the enemy vessels were lighters and mahelas not fitted with any armament, the mere fact that they were carrying troops armed with rifles was insufficient to make them "armed" vessels within the meaning of s. 42 of the Naval Prize Act. The point was further taken that no accurate evidence was available as to the number of persons on board the enemy vessels.

Wilfrid Lewis for the claimants.

C. W. Lilley for the Procurator-General.

[In the course of the arguments it was contended that the decision of the Privy Council in *H.M. Submarine E.*14 (1) was not an authority for the proposition that a lighter carrying armed men was an "armed ship." Lord Sumner, in mentioning "troops armed with rifles," was merely going through the various sorts of armaments held by Sir Samuel Evans in the Court below as being insufficient in his opinion to constitute an "armed ship"; and Lord Sumner, dealing with the qualifications as a whole, said that their Lordships were unable to accept those propositions. In fact the troop-ship sunk by the *E.*14 had several light field guns on board.]

Cur. adv. vult.

March 5. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: These are a series of claims for prize bounty under the provisions of the Naval Prize Act, 1864, s. 42, on behalf of Captain Wilfrid Nunn, R.N., and the officers and crews of various sloops, launches and armed horseboats in His Majesty's service which were engaged during 1914 and 1915 in operations on the River Tigris and Euphrates against naval forces of the Ottoman Empire.

Prize bounty is payable under s. 42 by distribution among such of the officers and crews of any of His Majesty's ships of war as are actually present at the taking or destruction of any armed ship of any of His Majesty's enemies of a sum

(1) [1920] A. C. 403.

1923

THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15, *In the Matter of.*

The President.

calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement. By s. 2 of the statute the term " ship of war of His Majesty " includes any vessel of war of His Majesty and any hired armed ship or vessel in His Majesty's service. Captain Nunn, as senior naval officer of the Persian Gulf Division of the East Indies Station, had under his command at the time of the various operations here in question a diversity of vessels, including horseboats, but there is no dispute that all the claimants' vessels come under the description of ships and vessels of His Majesty which are included in the provisions of s. 42.

The operations for which prize bounty is claimed are the sinking and destruction of a Turkish river gunboat on November 9, 1914, by H.M.S. *Espiègle* near Muhammareh on the Tigris, at a point distant some forty or forty-five miles from the river mouth ; the sinking on November 19, 1914, by the *Espiègle* some miles further up the Tigris of a Turkish gunboat which was salved and became H.M.S. *Flycatcher* ; the sinking of the Turkish gunboat *Marmaris* and capture of the steam vessels *Bulbul* and *Mosul* and the capture of numerous barges and mahelas on June 1 and 2, 1915, in the Tigris up river from the junction of the Tigris and the Euphrates at Qurnah ; the capture on June 3, 1915, at Amarah, some ninety miles up river beyond Qurnah, of various steam vessels and lighters ; and the destruction on July 24, 1915, at Nasiriyah on the Euphrates, some 120 miles beyond Basra, of a Turkish river gunboat. The distances I have stated, which are roughly estimated, indicate the extent of Captain Nunn's field of operations.

The questions raised at the hearing were whether the capture and destruction of the various vessels in respect of which the claims arise were effected solely by the respective claimants or were joint operations of naval and military forces ; whether the ships and vessels captured and destroyed were " armed," within the meaning of the term as used in s. 42 ; and what are the numbers in respect of which, if at all, these claims for prize bounty ought to be allowed.

The duty of the naval forces in Mesopotamia in course of

1923

THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15, *In the Matter of*.

The President.

which the vessels under consideration were captured or sunk was that of co-operation with the military expeditionary force under the immediate command of General Sir Charles Townshend. Apart from this general duty Captain Nunn, as senior naval officer, was under the orders of the Commander-in-Chief on the East Indies Station and of the Board of Admiralty.

The claims made in respect of the sinking on November 9, 1914, of a Turkish gunboat off Muhammareh Island, the sinking on November 19, 1914, of another gunboat higher up the Tigris, the sinking on June 1, 1914, of the gunboat *Marmaris*, and the sinking on July 24, 1915, of an unidentified gunboat on the Euphrates were not disputed at the hearing.

The allegation on the part of the Treasury that the events out of which the claims arise were joint acts of military and naval forces depended upon the scheme of the operations in which the same occurred and the terms in which the incidents themselves were described in military dispatches, the pronouns "we" and "ours" being used as to each of them, though without anything of a precise nature to indicate that the language employed was used with regard to things actually done by troops as distinguished from naval forces. The issue here depends upon ascertaining what was in fact done. At the end of May, 1915, when the Turkish forces retreated from Qurnah towards Basra, a combined advance of British troops and naval forces took place which covered the period of the disputed claims. The naval forces during this time reconnoitred for the army, conducted the transport operations when river transport was used, and from time to time successfully engaged Turkish naval forces and overtook and captured various vessels which were conveying Turkish troops, and munitions—inclusive of field guns, bombs, mines, rifles and ammunition. Sir Charles Townshend was, at material times, with an officer of his staff, on board whatever vessel was being used by the senior naval officer as his flagship, and other military officers were distributed among other vessels in the command. The bridge of the flagship commanded the surrounding country and the General used it

1923

THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15, *In the Matter of.*

The President.

for purposes of observation. His communication with his forces was to some extent maintained by wireless telegraphy from the flagship. He was kept informed of what was being done under Captain Nunn's command, but he did not direct and he took no part in the operations of the naval force. On board one of the vessels was a detachment of an English regiment which had been detailed for service under naval command and which acted in the capacity of marines. The advance beyond Basra to Amarah was one in which the army and navy closely co-operated, and I believe the knowledge that troops were advancing was an inducement to the surrender by Turkish forces of some of the captured craft. But no troops were upon the scene when any of the sinkings and captures in question were carried out, and I am of opinion, upon like grounds of principle to those which I stated in the somewhat similar case of *The Sulman Pak* (1), that these several sinkings and captures were solely effected by the respective claimants.

The question whether the lighters and mahelas in question were armed vessels is perhaps not directly covered by *H.M. Submarine E.*14 (2), to which reference was made, but guidance is to be found there which helps in its determination. On behalf of the Crown it was submitted that only the gunboats manned by Turkish naval forces were "armed vessels," so as to be the subject of claims for prize bounty. The material fact with regard to the lighters and mahelas here in question is that they were conveying armed troops who had at their disposal on board these vessels an abundance of weapons capable of being used for the destruction of His Majesty's ships and vessels which were in action against them. These troops with the weapons at their disposal could without any exceptional display of skill or courage have put out of action most, if not all, of the claimants. The substance of the question, as it was presented to me, was whether vessels so provided as these craft were must be excluded from the category of armed vessels by reason of the fact that they were not built for combatant action and had not at the time

(1) [1922] P. 73. (2) [1920] A. C. 403.

1923

THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15, *In the Matter of.*

The President.

of their capture any armament which was structurally attached to them. Inasmuch as the several vessels were ships of the enemy, and in each instance carried troops "armed, or provided with arms," with which they could have fought and destroyed His Majesty's vessels (by which in fact they were destroyed or captured), I must decide this question in favour of the claimants.

No accurate figures are available to establish the numbers of the persons who were on board the several enemy vessels described in the claim, at the beginning of the various engagements. It is a matter of estimate, and, as I believe the estimate of the claimants to have been made with the intention of accuracy, I accept it. There will accordingly be awards in favour of the several claimants of the amounts stated in the schedule to the notice of motion. That will be a total award of 10,500*l.*

Solicitors for the claimants: *Woolley, Tyler & Bury.*
Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. M. T.

ADMIRALTY.

1923
March 23.

THE PORTREATH.

Shipping—Salvage—Abandonment—Call for Volunteers to return to Ship—Claim for Salvage by Members of Crew—Contract of Service—Duty of Crew.

The crew of a vessel are not entitled to salvage remuneration for services rendered to the vessel unless their contract of service has been dissolved, and the mere fact that the master has ordered the ship to be abandoned and the crew to take to the boats and go on board another vessel does not put an end to the contract of service.

The master of the defendants' vessel, thinking she was in danger of sinking as the result of a collision, gave orders to abandon ship, and he and the crew went on board a pilot cutter which was standing by. Shortly afterwards he came to the conclusion that the vessel was not sinking and called for volunteers to return to her. About half the crew, including the plaintiffs (the second officer and seven other hands), responded and

1923

THE PORTREATH.

returned to the vessel and navigated her while she was towed in shore and beached :—

Held, that the plaintiffs' contract of service had not been determined by the temporary abandonment and that the plaintiffs were not entitled to salvage.

The Florence (1852) 16 Jur. 572 and *The Warrior* (1862) Lush. 476 followed.

CONSOLIDATED actions for salvage remuneration on behalf of (1.) the owners, master and pilots on station duty and the crew of the steam pilot cutter *Ilona*, and (2.) the second officer and seven other members of the crew of the steamship *Portreath* for services rendered to the *Portreath*, her cargo and freight.

The *Portreath*, a vessel of 3726 tons gross, manned with a crew of twenty-nine hands, while on a voyage from Buenos Ayres to Avonmouth with a cargo of grain, was run into by the steamship *Remus* shortly after midnight on October 26, 1922, while at anchor near the Breaksea light vessel. It was a severe collision, a large hole being made in the *Portreath's* starboard side in the way of No. 1 hold which filled with water. A quantity of cargo was washed out and the grain which remained absorbed water. The *Portreath* sent out wireless signals and got in touch with the *Remus* and with the Dutch tug *Humber*, and at 5.30 A.M. the *Humber* arrived in the vicinity and stood by. The weather was foggy. The *Portreath*, which was drawing 24 feet forward and 18 feet aft, lay at anchor till daybreak, when the pilot cutter *Ilona* arrived. During the night the *Portreath* had been lying without any substantial list, but at about the time the *Ilona* came up, the master noticed that his vessel was getting a list to port and thought she was getting more by the head. He accordingly gave orders to abandon ship. He and the crew then took to the boats and were picked up by the *Ilona*. Shortly afterwards, encouraged by the pilots on board the *Ilona*, the master of the *Portreath* realized that his apprehensions were not justified and called for volunteers to return to the ship. He got responses from sixteen out of the twenty-eight members of the crew, including the eight plaintiffs. The sixteen volunteers, with the master,

then went back to the *Portreath*, the *Ilona* made fast ahead, and with the *Portreath* working her own engines towage towards the shore began. About an hour later the tug *Humber* came up and made fast, and in doing so got foul of the *Ilona*; the latter then slipped her rope and made fast aft to assist in steering. Subsequently the *Portreath* was beached between Nell's Point and Barry breakwater.

The plaintiff members of the crew of the *Portreath* alleged that in returning and remaining on board a vessel which it was believed might sink at any moment, they ran very grave risk, and their gallantry materially assisted in the saving of the *Portreath* and her valuable cargo. The defendants denied that these plaintiffs were entitled to any salvage reward.

The value of the *Portreath* together with her cargo was 79,800*l*.

D. Stephens K.C. and *Langton* for the first set of plaintiffs, the owners, pilots on station duty and the crew of the *Ilona*.

Dumas for the second officer and seven hands of the *Portreath*. These plaintiffs are entitled to salvage. Their contract of service had been determined by the order given by the master to abandon the ship: see *The Florence* (1) and *The Warrior*. (2) When the painter was cut and the crew rowed to the *Ilona* the master had abandoned the ship sine spe revertendi—he treated her as a lost ship. When the master wanted to return he called for volunteers; he did not order the crew to return. Had he given orders and the crew had refused to go back, it is submitted that they would have been entitled to adopt that attitude and could not have been prosecuted under the Merchant Shipping Act for their refusal to obey orders.

Bateson K.C. and *Noad* for the defendants. The seaman's duty towards his ship and his obligation to protect her through all perils was laid down by Lord Stowell in *The Neptune*. (3) On the cases cited on behalf of the plaintiffs it is obvious that

(1) 16 Jur. 572. (2) Lush. 476.
(3) (1824) 1 Hagg. Adm. 227, 236.

1923

THE PORTREATH.

there was no real abandonment in this case. [They were stopped.]

HILL J. [after stating the facts and dealing with the services of the pilot cutter *Ilona*, in respect of which he awarded 1260*l*., his Lordship continued as follows:] The claim by the eight members of the crew of the *Portreath* raises important and quite distinct issues.

In my opinion there is no foundation for this claim. The plaintiffs are members of the crew, and Mr. Dumas, who has argued the case with his usual ability, recognized that they can only claim as salvors if the circumstances were such as to put an end to their contract of service. He contended that the contract of service was at an end when the master, apprehensive that the ship would sink, gave orders to "abandon ship." Mr. Dumas said that his contention was further borne out by the fact that ten or fifteen minutes later, when the master was minded to return to the ship, he did not order the crew to go back but called for volunteers.

In my view it would be most dangerous to regard seamen, owing a duty under a contract, as entitled in such circumstances to convert themselves into salvors, and I have come to the conclusion, dealing with the case without any reference to the authorities, that there is no justification for saying that there was anything which determined the plaintiffs' contract of service. But I have a better guide than my own view on the matter because the case seems to me to be absolutely covered by the authorities cited. In the first place there is the old general principle of a seaman's duty for which I was referred to the judgment of Lord Stowell in *The Neptune* (1): "What is the obligation," his Lordship said, "which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favourable weather, but likewise in adverse weather inducing shipwreck, to exert himself . . . . to save as much of the ship and cargo as he can. It is part of his bounden

(1) 1 Hagg. Adm. 236.

duty in his character of a seaman of that ship. It is certainly a laborious, and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages. I ask, is he to have no recompense for this continuation of his service in its most formidable shape, which that service to that ship can assume ? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on a quantum meruit. There are, I think, decisive objections to both these views of the matter. The doctrine of this Court is justly stated by Mr. Holt—that the crew of a ship cannot be considered as salvors. What is a salvor ? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship;—not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. Accordingly, we see in the numerous salvage cases that come into this Court the crew never claim as joint salvors, although they have contributed as much as (and perhaps more than) the volunteer salvors themselves. I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the Court to open itself to their claim of a persona standi in judicio. But they must be very extraordinary circumstances indeed ; for the general rule is very strong and inflexible that they are not permitted to assume that character."

Then I come to the consideration of the application of that principle by Dr. Lushington in two cases. In *The Florence* (1)

(1) 16 Jur. 572, 573.

1923

THE PORTREATH.

Hill J.

he said that the question is " whether, when a merchant ship is abandoned at sea sine spe revertendi aut recuperandi, in consequence of damage received and the state of the elements, such abandonment taking place bona fide and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to, or whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being again called into force." He then considers the various circumstances under which the contract can be determined and says that in the first place the abandonment must take place at sea and not upon the coast. I am satisfied that in this case what occurred was " at sea " within the meaning of Dr. Lushington's judgment. Then the learned judge says: " Secondly, the abandonment must be sine spe revertendi; for no one would contend that a temporary abandonment, such as frequently occurs in collisions, from immediate fear, before the state of the ship is known, would vacate the contract. Thirdly, the abandonment must be bona fide for the purpose of saving life. Fourthly, it must be by order of the master, in consequence of danger by reason of damage to the ship and the state of the elements."

Dr. Lushington contemplates precisely this case. It was not, it is true, an abandonment, a leaving of the ship, in the moment immediately after the collision, but it was in consequence of the collision, at a time when the master supposed that the ship was exposed to risk of sinking; and in order to save himself and his crew he gave the order to take to the boats. In *The Warrior* (1), in discussing the ways in which a seaman's contract of service may be dissolved, and leaving aside the question when it is dissolved by warlike capture, the learned judge says: " It may be dissolved by final abandonment of the ship, or by the act of the master giving the seamen a discharge." " With respect to the abandonment," the learned judge continues, " I should be sorry to go the length of saying, looking at the facts, that there was such an abandonment of the ship as would

(1) Lush. 476, 482.

have justified the seamen in saying that their contract was at an end, and that they were not bound to render further assistance. If the case rested entirely upon the ship having been finally abandoned, I should be inclined to come to the conclusion that abandonment has not been proved. Where the circumstances are doubtful, the Court will be slow to infer that property of great value has been abandoned, unless it is proved that there was no reasonable hope of recovery. Abandonment is abandonment sine spe recuperandi."

In my view when one finds a master giving orders to his crew to abandon ship and go on board another vessel because he thinks his ship is sinking, and then within a short time, on maturer judgment, he arrives at the conclusion that the ship is not sinking, there is no foundation for saying that there was any final abandonment of the ship. There was no dissolution, no determination of the contract of service. The fact that the master called for volunteers instead of ordering the crew to go back appears to me to have no bearing on the question. The claim of these plaintiffs will be dismissed with costs.

Solicitors for both sets of plaintiffs : *William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

Solicitors for the defendants : *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

E. C. M. T.

C. A.
1923
May 14, 15, 16.

[IN THE COURT OF APPEAL.]

THE SOCRATES AND THE CHAMPION.

Shipping—Collision—Tug and Tow and Third Ship—Vessels leaving Dock in foggy Weather.

In foggy weather the first defendants' steamship in tow of the second defendant's tug coming out of Tilbury Dock came into collision with the plaintiffs' steamship bound up river. The Admiralty Court found the plaintiffs' vessel one-half to blame on the ground of excessive speed, and the tug and tow one-half to blame for leaving the dock in the prevailing state of the weather:—

Held, on the advice of the nautical assessors, that it was not imprudent for the tug and tow to leave the dock under the existing circumstances, and that the plaintiffs' vessel was alone to blame.

Decision of Hill J. ante, p. 76, reversed.

Appeal and Cross-Appeal from a decision of Hill J. in an action of damage by collision.

The plaintiffs were the owners of the steamship *San Jose*. The defendants were the respective owners of the steamship *Socrates* and the tug *Champion*. The collision took place on the morning of January 27, 1922, in foggy weather in the Thames off the Tilbury Dock entrance. The *San Jose* was bound up river and the *Socrates* was outward bound from the dock in tow of the *Champion*. Hill J. held all three vessels to blame, the *San Jose* for excessive speed and the *Socrates* and *Champion* for leaving the dock in the existing state of the weather. Both defendants appealed and the plaintiffs cross-appealed.

By agreement between the two defendants the appeal was argued as one appeal with one set of counsel only, and was confined to the point that the tug and tow were not negligent in leaving the dock. Accordingly, the questions of the separate liability of the tug and of the apportionment between the defendants of the blame, if any, were not argued.

Stephens K.C., *Balloch* and *E. A. Digby* for the appellants.
Batten K.C. and *Dumas* for the respondents.

The Court (Lord Sterndale M.R., Warrington and Scrutton L.JJ.), on the advice given by the nautical

assessors, held that it was not imprudent under the circumstances for the tug and tow to leave the dock, and that accordingly the *San Jose* was alone to blame.

C. A. 1923

THE SOCRATES AND THE CHAMPION.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the appellants: *Stokes & Stokes, for Cameron, MacIver & Davie, Liverpool; Botterell & Roche.*
Solicitors for the respondents: *Thomas Cooper & Co.*

E. C. M. T.

[IN THE ARCHES COURT OF CANTERBURY.]

1923
June 5, 11.

THE OFFICE OF THE JUDGE PROMOTED BY

ARTHUR THOMAS MARSON

v.

EDWARD CARL UNMACK (CLERK).

Ecclesiastical Law—Criminal Suit by Letters of Request—Church Discipline Act, 1840 (3 & 4 *Vict.*, *c.* 86), *s.* 13—*Form of Articles—Signature of Counsel—Admissibility of Responsive Plea—Motion treated as Hearing of Suit—Disposal of Moneys collected at Offertory, and otherwise—Parochial Church Councils* (*Powers*) *Measure*, 1921 (*No.* 1), *clauses* 4 (1) (*ii*) (*a*), *and* 6 (*iv*).

Money given at the offertory in the Communion Office must still be disposed of, as directed by the rubric, to such pious and charitable uses as the minister and churchwardens shall think fit; or, in case of disagreement, as the Ordinary shall appoint. An announcement of the objects beforehand is not obligatory, but is not unlawful.

Collections in church, during Morning or Evening Prayer, may lawfully be made and announced, at the discretion of the incumbent. But the allocation of money so collected is now a matter for the joint decision of the incumbent and the Parochial Church Council.

It is not an ecclesiastical offence, in the case of the Holy Communion being combined with, or following, another service, to take two collections (one at the offertory) from the same gathering.

Churchwardens never had, and Parochial Church Councils have not now, any voice in the disposal of money collected at extra-legal services or meetings held under the authority of the incumbent elsewhere than in church, unless such money has been allocated to "church purposes."

1923

ARTHUR THOMAS MARSON *v.* EDWARD CARL UNMACK.

within the meaning of the Parochial Church Councils (Powers) Measure, 1921, clause 4 (1) (*ii*) (*a*). Money collected at such services or meetings (unless so allocated) must be applied to the objects (if any) announced by the incumbent.

Semble : In a criminal suit in the Arches Court, the articles exhibited should state seriatim the particular laws alleged to have been infringed. Such articles should also be signed by counsel, the ancient practice of the Court, which required the signature of an advocate, being now satisfied by the signature of a barrister.

THIS case came before the Court by virtue of Letters of Request from the Bishop of Winchester in the first instance, under s. 13 of the Church Discipline Act, 1840.

The Letters of Request recited that the Rev. Edward Carl Unmack, Rector of West Horsley, Surrey, in the Diocese of Winchester and Province of Canterbury, was charged with having offended against the laws ecclesiastical; and the Bishop of Winchester having affixed his signature thereto on February 12, 1923, the Dean of the Arches accepted them, and a Decree under Seal issued on March 12, 1923.

Articles were exhibited on April 13, 1923, on the part of the promoter, Arthur Thomas Marson, J.P., the people's churchwarden of West Horsley, and also Vice-Chairman, and one of the treasurers, of the Parochial Church Council, alleging irregularities against the defendant in the matter of notices of collections, and of the disposal of moneys collected at the offertory, and at other times, both in and out of the parish church, and representing such irregularities to have infringed the rights of the churchwardens, or (as the case might be) of the Parochial Church Council. There was also an allegation of wrongful reception of clerk's fees. The Articles prayed that upon legal proof of the matters hereinbefore alleged, the defendant might be admonished, and such order as to costs made as to the Court should seem proper. By way of responsive plea the defendant (in person) filed and delivered on May 10, 1923, an inartificially framed document, to which the promoter notified his objection on the ground of irrelevancy.

1923. June 5. On this day the Dean of the Arches (Right Worshipful Sir Lewis T. Dibdin, D.C.L.) sat in

Court (1) to hear a motion on the part of the promoter to oppose the admission of the responsive plea.

[THE DEAN OF THE ARCHES. The Articles themselves are not free from objection. They do not specify seriatim the particular laws alleged to be infringed. Further, they are not signed by counsel. The ancient practice of this Court required the signature of an advocate. That requirement is now satisfied by the signature of a barrister: *Mouncey* v. *Robinson*. (2) This practice does not depend on the Rules of 1867 (3), which are not a complete code. It rests on established custom, evidenced by the Canons of 1603. (4)]

After some discussion the learned judge struck out certain passages in the responsive plea as being on the face of them irrelevant. Subject thereto, it was agreed, by consent of both parties, that the pleadings and documents incorporated should be taken as they stood, and the determination of the points of law left to the Court, the hearing of the motion being treated as the hearing of the suit. Accordingly, oral evidence was dispensed with on either side.

N. C. Armitage for the promoter. The substantial object of the suit is to enforce the rights of the churchwardens and of the Parochial Church Council. It is submitted that it is an ecclesiastical offence to announce the purpose of a collection, unless such purpose has been previously approved, in the case of the offertory, by the churchwardens, or, in the case of other collections, by the Parochial Church Council.

It is also an ecclesiastical offence to take two collections from the same congregation, one of them being at the offertory. The other must be an illegal interpolation. Moneys collected at services or meetings held by the incumbent or under his authority elsewhere than in the parish church are moneys "raised for Church purposes." Their administration comes

(1) The Court sat in the Upper House of Convocation at the Church House, Westminster.

(2) (1867) 37 L. J. (Eccl.) 8.

(3) 36 L. J. (Eccl.) 1.

(4) See, e.g., Canon 131 of 1603: "No judge in any of the said Courts of the Archbishop shall admit any libel or any other matter, without the advice of an advocate admitted to practise in the same Court, or without his subscription."

1923

ARTHUR THOMAS MARSON v. EDWARD CARL UNMACK.

under the powers, duties, and liabilities of the churchwardens, which are transferred to the Council by clause 4 (1) (ii) (*a*) of the Parochial Church Councils (Powers) Measure, 1921 (No. 1). (1)

[THE DEAN OF THE ARCHES. Clause 6 (iv) is limited to "moneys to be given or collected in Church."]

In the case of a proprietary chapel, it was held in this Court that the alms collected at the offertory were at the disposal of the incumbent and churchwardens of the parish church, and not of the minister or proprietors of the chapel: *Moysey* v. *Hillcoat*. (2) The churchwardens were always the proper custodians of moneys collected for ordinary church expenses: *Howell* v. *Holdroyd*. (3)

Defendant in person.

Cur. adv. vult.

June 11. THE DEAN OF THE ARCHES. This suit relates to a dispute or rather a series of disputes between the Rector of West Horsley in the diocese of Winchester and the people's churchwarden and Parochial Church Council of that parish. One cannot help regretting that, the pastoral care of the Bishop notwithstanding, his efforts have not been found adequate for the settlement of these rather petty parochial feuds. His Lordship has, however, thought fit to send the matter by Letters of Request to the Archbishop's Provincial Court, and the so-called "request" is one which I cannot lawfully refuse. The promoter, who, besides being churchwarden, is a solicitor, complains that the rector has not complied with the law as to the occasions when collections may be made in church, nor as to the announcement beforehand of the objects of collections and offertories, nor as to the application of moneys given at collections and offertories in the church and elsewhere, nor as to clerk's fees demanded by and paid to the rector. The disputes have been in regard

(1) The measures of the Church Assembly acquire the force of law by virtue of the Church of England Assembly (Powers) Act, 1919 (9 & 10 Geo. 5., c. 76), s. 4. These measures are published periodically by the Incorporated Council, uniformly with the Public General Statutes.

(2) (1828) 2 Hagg. Eccl. 30, 56.

(3) [1897] P. 198.

1923

ARTHUR THOMAS MARSON *v.* EDWARD CARL UNMACK.

The Dean of the Arches.

to somewhat small amounts, and appeals seem to have been made by both sides to the Bishop of Winchester to exercise his powers, under the rubric as to offertories, and under the Measure of 1921 as to collections. His Lordship has confined himself to giving advice of a general character to the parties, and I do not think any wiser counsel of that sort could be offered than the following, which sums up the Bishop's treatment of the matters submitted to him : " The Measure assumes that Incumbent and Council are going to work together for the good of the Church. If there is distrust on either side, or an inclination to lay stress on ' rights ' rather than ' duties,' difficulties are bound to arise, and the only thing that can remove those difficulties is a mutual consideration."

His Lordship does not appear to have given any decision on the concrete question of what was to be the destination of the actual collections as to which the rector and the churchwarden and Parochial Church Council disagreed.

Both the Articles and the Responsive Plea contain many statements about an undertaking in writing which the promoter and the Parochial Church Council seem to have desired to obtain from the defendant. It does not appear that the contents and terms of this undertaking were ever agreed between the parties, and I am unaware of any right on the part of the promoter-churchwarden or the Parochial Church Council to demand it, or of any obligation on the part of the defendant rector to give it. I think therefore that this complication in an already complicated dispute may be disregarded. It will be convenient that I indicate what in my opinion is the law with regard to one or two points of importance—indeed perhaps the only points of general importance in this unfortunate dispute.

I need hardly say that in public worship deviations from the services contained in the Prayer Book, unless authorized by or under the Acts of Uniformity, are unlawful.

A collection made during Mattins or Evensong—I exclude an offertory during the Communion service because that is expressly provided for by rubric, and may therefore perhaps be regarded as a part of the service—is not provided for in the

1923

ARTHUR THOMAS MARSON *v.* EDWARD CARL UNMACK.

The Dean of the Arches.

Prayer Book. It is an incident occurring during a service or interposed between different portions of it, but it is no more part of the service than a voluntary played on the organ or the action of a verger closing windows or lighting the gas while the service is in progress. Though of course varying greatly in degree of importance, they are all alike in being matters, not in themselves irreverent or unseemly, but outside the rites and ceremonies of public worship. Such a collection is an interlude entirely at the option of the minister, and has its sole justification in the sanction of long custom. It is quite impossible to treat the action of the minister in ordering a collection to be made during morning or evening service as an ecclesiastical offence. But, if he orders such a collection, its allocation is, under the Measure of 1921, a matter for the decision of himself and the Parochial Church Council jointly.

The defendant appears to have caused a collection to be made during or after Mattins, or Evensong, although a celebration of Holy Communion immediately followed, or was combined with, the other service, and an offertory was made during the Communion service in accordance with the rubric, but in addition to the other collection. It is no part of my duty to consider whether the making of what are practically two collections at one gathering is a convenient or desirable course, but I cannot hold that an incumbent who pursues it to the extent I have stated is guilty of an ecclesiastical offence, especially if, as in this case, the incumbent is continuing a practice which he has maintained for many years, and, I gather, without objection from his Bishop.

I am of opinion, therefore, that the defendant has not acted so as to merit censure, either by having a collection during Mattins or Evensong, or by having one notwithstanding that a subsequent offertory during the Communion office was to be taken.

There is no obligation on a clergyman to announce the object to which moneys given at the offertory (during the Communion service) will be devoted. Such moneys must, however, be expended as directed by the rubric. There

is no objection to such an announcement, if the object or objects selected are so selected by the minister and churchwardens acting in agreement, and come within the description "pious and charitable uses." Collections in church, other than those made at the offertory, may lawfully be made for objects determined by agreement between the incumbent and the Parochial Church Council. Such objects may be, and I think, having regard to the language of clause 6 (iv) of the Measure of 1921, ought to be announced to the congregation before the collection. When the objects have been so determined and announced, the resulting collections must of course be applied to those objects. The defendant is said to have announced collections in church on certain occasions as for objects which had not been previously approved by the Council, and, on one or two occasions, when the Council had expressly asked the defendant to have collections for other objects than those announced by the defendant.

It is however admitted that these divergencies between the defendant and the Council had ceased before this suit began, and on that account I have not thought it necessary to inquire into the sufficiency of the explanation which the defendant makes in his responsive plea, and was eager to substantiate. Both the promoter and the defendant understand the several duties of the incumbent, churchwardens, and Parochial Church Council, as to offertories and collections, and it is to be hoped that all will rigorously adhere to them, remembering the wise words of the Bishop which I have already quoted.

Moneys collected by the incumbent at services held by him, or under his authority, elsewhere than in church, must be applied to the objects (if any) which he has announced as the objects for which such collections are to be made. What those objects are to be is a matter solely for the decision of the incumbent, and, subject to one exception, neither the churchwardens nor the Parochial Church Council have any concern with the administration of such collections. If a collection be made not in church but for church purposes which, before the Measure of 1921, would have been within

1923

ARTHUR THOMAS MARSON v. EDWARD CARL UNMACK.

The Dean of the Arches.

the powers, duties, and liabilities of the churchwardens, the moneys so collected ought, I conceive, to be administered by the Parochial Church Council under clause 4 (1) (ii) (*a*) of the Measure. "Church Purposes," even limited to those formerly within the powers, duties and liabilities of churchwardens, is a somewhat vague description, which, in my opinion, denotes purposes connected with the fabric, goods, ornaments, or services of the parish church. It would not in my view extend to collections made for foreign missions or for some other outside religious purpose. It is significant that the power conferred by clause 6 (iv) on the Parochial Church Council to determine jointly with the incumbent the destination of collections is limited to collections "in church." Churchwardens had, and Parochial Church Councils have, no more control or authority over religious gatherings in a school room or mission hall, than over a drawing-room meeting for a religious purpose in a private house. It is, in my opinion, impossible to suppose that money collected at such gatherings can be claimed (with the one exception I have indicated) by the Parochial Church Council for administration. Without very express and clear words, no enactment could be construed so as to interfere so gravely with individual liberty of action. I think therefore that the claim that the Parochial Church Council's approval of the objects for which collections are made by the defendant at services elsewhere than in church is necessary, and that moneys so collected ought to be paid to the treasurers of the Council, is ill founded.

All moneys of which the administration belongs to the Parochial Church Council ought to be placed at their disposal as soon as possible after they have been collected, and the treasurers are the proper persons to receive money on behalf of the Council. I am unaware of any legal requirement which limits the period during which an incumbent may lawfully hold moneys which ought to be eventually handed to the Parochial Church Council, before so handing them over. Each case must be judged according to its own circumstances. Certainly such moneys, if they come to the possession of the incumbent, ought to be handed over with promptitude, and

delay in doing this might be so protracted as, in the absence of explanation, to amount to a serious dereliction of duty. There is no real case against the defendant on this score. The sum of 1*l.* was claimed by the promoter as having been given with the defendant's consent to a particular object. The defendant denied, and still denies, that he had so consented; but after the interval of five months, as he says, in the interests of peace, he paid the 1*l.*

The rubric contemplates the clerk's fees on a marriage being paid to the officiating clergyman in the first place, and, in the absence of a parish clerk, his fees are often taken by the incumbent, and paid to the person performing the duties of clerk for the occasion. In the present case the defendant's wife appears to have held the office of clerk during a part of the time he is said to have wrongfully received fees. The defendant's wife does not make any complaint. Since her retirement from the office, there has been no parish clerk, and the defendant either has received no fees, or still holds any moneys he has so received. The sum involved is only a few shillings. There may have been some irregularity, but if so it has been of a technical character, because the services in respect of which the clerk's fees are allowed have been in fact performed. I cannot regard it as an ecclesiastical offence in respect of which I ought to admonish the defendant. The promoter claims that the defendant should be monitioned to abstain from wrongfully receiving burial as well as marriage fees, but he alleges no case except as to the latter.

I am desirous to say nothing which will in any way add to the unhappy friction which seems to have existed between the parties, and I refrain from any observations on the merits of either side. I content myself with saying that I think the defendant is entitled to be dismissed from further observance of justice in this suit. It is therefore dismissed, but I make no order as to costs.

Suit dismissed.

Solicitors for the promoter: *Marson & Toulmin.*

Defendant in person.

W. D. T.

1923
June 11.

DIVORCE.

DEAN *v.* DEAN.

Husband and Wife — Judicial Separation — Permanent Alimony — Amount — Practice — Discretion of Judge — Exceptional Cases — Source and Fluctuation of Husband's Income — Acceptance by Wife of low Scale of Maintenance before Desertion—Increase in Husband's Means.

In fixing the amount of permanent alimony to be allowed, after a decree of judicial separation, to an innocent wife, the Court follows the rule adopted by the Ecclesiastical Courts of allowing one-third of the husband's income. But that is not a hard and fast rule. The Court has a discretion and can vary the amount according to circumstances. This discretion is entrusted to the Court or a judge; it ought not to be exercised by the registrars.

The fact that the husband's income is large is not a reason for departing from the general rule. But the fact that his income is derived from ordinary shares in commercial undertakings and is exposed to great fluctuation is a ground for reducing the proportion.

On the other hand, the fact that the wife has, during part of her married life, lived apart from her husband with his consent, and acquiesced in a narrower scale of living than her husband in later years could have afforded, gives no reason for the Court reducing the usual proportion.

The right of the wife to alimony does not depend wholly on the statutes, but is based on her common law right to pledge her husband's credit for necessaries according to his station.

In this case the husband's income for the three years preceding the registrar's order was 5700*l.* The registrar allowed the wife the full third, 1900*l.* a year. The judge, on the ground that the income was to some extent precarious and tended to fluctuate, reduced the sum to 1500*l.* a year.

Application by wife for permanent alimony.

The parties were married in December, 1908. Early in 1909 a child was born, the result of intercourse before marriage. At that time the wife was being trained as a typist, and the husband was travelling for a business belonging to relatives of his from whom he had very considerable expectations, and he was anxious to conceal his marriage. He took a flat for his wife, provided for her maintenance and visited her regularly, but they never had a matrimonial home. He had at first a comparatively small income and allowed his wife about 350*l.* a year, while his own living cost about 500*l.* Shortly before the war the companies in which he was interested

became prosperous and his income rose to between 900*l.* and 1200*l.* During the war there were two years in which his income was 2000*l.*, and one in which the losses were so heavy that he received no income at all. After the income increased he had allowed his wife 35*l.* a month and later 50*l.* a month, which was paid during the war. The husband served in the war with distinction. After the war he refused to return to his wife. She obtained a decree for restitution of conjugal rights on May 13, 1921, and on his disobedience obtained a decree for judicial separation on July 17, 1922. She then filed a petition for permanent alimony. The registrar, upon evidence that the husband's income for the last three years had been 5700*l.*, awarded her 1900*l.* a year and 150*l.* a year for maintenance of the child.

The husband appealed to the judge for a reduction of the alimony allowed to the wife. He made no objection to the sum allowed for the infant.

The case was argued in chambers, but the President adjourned the case into Court for judgment only. (1)

Sir Ellis Hume-Williams K.C. and *F. van den Berg* for the husband.

Singleton K.C. and *Noel Middleton* for the wife.

THE PRESIDENT (SIR HENRY DUKE). The registrar's order was objected to in respect of amount upon the grounds that the circumstances of the marriage and the circumstances

(1) The sections of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), referred to in the judgment were:—

Sect. 17: "Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the Court, and the Court on being satisfied . . . . may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just."

Sect. 22: "In all suits and proceedings other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

1923

DEAN v. DEAN.

The President.

of the position in life of the parties and of the means at the disposal of the respondent were not normal, and that, therefore, an order which applied what may be called the standard rate of provision did not take sufficient account of the facts.

It is, perhaps, desirable to say something at the outset as to the powers under which the Court deals with questions of this class. In the discussion before me the function which is exercised by the Court in respect of orders for alimony and for permanent maintenance was treated as though it was one function in every class of case. That is not quite the correct view. The origin of the power of the Court with regard to orders of this kind is different in respect of the various subject matters, and the procedure and the considerations which apply in respect of the various subject matters are different.

With regard to a decree of permanent alimony after judicial separation, the jurisdiction of the Court arises under ss. 17 and 22 of the Matrimonial Causes Act, 1857. [His Lordship read those sections and continued:] In the Ecclesiastical Courts the usual rate of alimony pendente lite in the normal case was something in the neighbourhood of one-fifth of the husband's income, and ordinarily something in the neighbourhood of a third of the husband's income where the decree had been made and the alimony was permanent. The statute which enabled this Court to make an order for reasonable alimony for a wife after judicial separation provided that the Court should take account of the former practice of the Ecclesiastical Courts. But those Courts had not made a hard and fast rule; and there never has been a hard and fast rule in this Court. The Court has to make a reasonable provision. What was reasonable in the normal case had come to be realized in the Ecclesiastical Courts to be about one-third of the husband's income, and subsequent experience has shown that the usual order worked justice in the great majority of cases. It did not deal with the exceptional cases, and it did not purport to do so. When this case came before me it was said that the registrar had only purported to apply the usual rule, and that he had said if the matter was one in which the discretion of the Court was to be invoked

the parties would have to come to the Court. That was the footing upon which the appeal came before me. I think the spirit in which that matter was dealt with was perfectly correct. The discretion which is reposed in the Court by s. 17 of the Act of 1857 is a discretion which is entrusted to the Court itself, and had it not been that there was a common standard for the normal case, I do not think there would ever have been rules made which remitted the every day administration of its well understood jurisdiction to the registry. I do not think the statute created a discretion to be exercised in the registry. I think the discretion which is to be exercised is in the Court. When the rules are looked at it will be seen that there are special facilities for invoking the control of the Court. The matter goes to the registrar. There is an express power in the registrar to refer it to the Court. I do not doubt that in any case which seems to suggest reason for reference to the Court a registrar would at once accept the request that there should be a reference—there was no request in this case—and there is a right of appeal. I deal with the matter upon the footing, first of all, that the discretion which is to be exercised here is the discretion of the Court itself, and, secondly, upon the footing that no discretion purports to have been exercised in this case on the ground that there was anything exceptional in the circumstances of the case.

This is a case of a very considerable income on the part of the husband, and it is said that the extent of that income and certain circumstances in the marital relations of the parties which I will deal with, take the case out of the ordinary rule. [His Lordship stated the facts as above and continued :]

It is said on the part of the husband, first of all with regard to his income, looking at the circumstances here, bearing in mind that the source of the income is to a great extent a block of ordinary shares in a commercial undertaking dealing in slates, the income is not of the assured kind which would exist where there was real property or permanent property of some kind, which yielded its natural annual income without fluctuation. That, I think, is true, but, on the other hand,

1923

DEAN v. DEAN.

The President.

subject to some tendency to fluctuate, the income has been for many years now a substantial income, and the machinery of the Court provides for dealing with fluctuation if it is grave and continuous. I have come to the conclusion that if allowance were made in respect of the degree of precariousness there is about the husband's income, and its tendency to fluctuate, and bearing in mind that the Court has always power if real cause arises to vary its order, an allowance in respect of the character of the income which would reduce the wife's alimony to one-fourth instead of one-third would be in accordance with the practice of the Court. Roughly one-fourth would be 1500*l.* a year. That is how the thing would stand in the ordinary course if there were no other factors which are to be considered, and if you may treat this as an ordinary case of a husband with a large income and a wife having the rights of a wife.

It was said that all the circumstances of the marriage are entirely abnormal. It seems to me that what I have to ascertain is whether there has been such conduct as evidenced an agreement by the wife to be content with less than a wife should get under normal circumstances, or such conduct as would lead the Court to suppose that the wife should not have the normal award of alimony to a wife. There has been no misconduct by the wife. She did not, I am satisfied, in any sense bring about this separation. The other question of whether her acquiescence in a much narrower scale of living than her husband in later years could have afforded, disentitles her from treatment upon the normal footing of a wife whose husband has refused to behave as a husband raises considerations of some importance. It is necessary to bear in mind, for example, what the right of a wife is. It is not a right which took its origin in Ecclesiastical Courts, or under the Matrimonial Causes Act of 1857. It is a right rooted in the common law of this country. It may be found illustrated in common law cases. I would refer, for example, in order that it may be seen with accuracy what kind of view I am speaking of, to cases like *Harris* v. *Morris* (1) and *Wilson* v.

(1) (1801) 4 Esp. 41.

Glossop. (1) They are cases which cover together a good part of a century, if not a whole century. They show the common law position, and there it appears, as no doubt the law is, that when a wife is deserted by her husband and left without the means of supplying herself with necessaries suitable to her position in life, she has a right and she is authorized as his agent of necessity to pledge his credit for the purpose of providing herself with maintenance, according to her husband's station. That is her right at common law when she is deserted by her husband. This wife was deserted and remains deserted. The effect of the decree for judicial separation is to substitute a fixed income in place of that mode of maintenance which the wife would have had under the common law by pledging her husband's credit for necessaries according to his position. So his position is the test. I do not think the test is the scale of living which she accepted while they were living together, though it was consistent with propriety and with the ordinary duties of a husband living with his wife. The right I am speaking of arises if the wife is deserted. The principle that the common law fixed and the mode in which the matter has been dealt with for generations in the Ecclesiastical Courts and in this Court is such as I have indicated. The standard has been a third of the means available for the parties, and it has extended to large incomes.

In *Cooke* v. *Cooke* (2) Sir John Nicholl, in the Arches Court, in a carefully considered judgment, dealt with the particulars of a large number of cases which illustrated the old practice. He referred there and in *Otway* v. *Otway* (3) to *Lord Pomfret's Case* (4), where "the income was 12,000*l.* and the alimony given was 4000*l.*; in that case the larger part of the fortune had come from the wife, and there was no family; but he was a peer and had that rank and dignity to support." It cannot be said, therefore, that there is any absolute rule that in the case of a large income the wife does not receive recognition of her rights as a wife. In *Otway* v. *Otway* (3) he added: "The

(1) (1888) 20 Q. B. D. 354.
(2) (1812) 2 Phillim. 40.
(3) (1812) 2 Phillim. 109.
(4) Not reported.

1923

DEAN v. DEAN.

The President.

law has laid down no exact proportion; it gives sometimes a third, sometimes a moiety; according to circumstances."

That is the position apart from some authorities which were mentioned on that part of the case. One is *Wood* v. *Wood* (1), where the Court of Appeal considered the position of a wife who had divorced her husband, and stated some general principles affecting a case of that kind. But that was a case where the relation of husband and wife had ceased by the act of the wife, and the provision for her was more the kind of provision which is reasonable in the case of a deceased husband than in the case of a husband still in being and still being her husband. There it was said also: "This Court has constantly disclaimed its right to fetter the exercise by any judge of a discretion vested by Act of Parliament in him." *Wood* v. *Wood* (1) cannot be relied upon textually as an authority in respect of permanent alimony after judicial separation. Of course it assists in the exercise of discretion, but it does not fix the mode of its exercise.

In *Kettlewell* v. *Kettlewell* (2) there was a dissolution of marriage, and the question was whether there should be a dum sola et casta clause; but *Wood* v. *Wood* (1) was followed. It is not a direct authority in this case. It merely gives general assistance to the Court in considering the very delicate question of the exercise of a judicial discretion in accordance with principle as it has been ascertained and to give due effect to the rights of the parties.

In *Sykes* v. *Sykes* (3) the admitted income of the husband was 16,600*l.* a year, and the award which was made to the wife for alimony pendente lite was at the rate of 3000*l.* a year, which was additional to some 800*l.* a year she had of her own. If these figures are correct it was absolutely in accordance with the old practice of the Ecclesiastical Courts and with the general practice of this Court. It does not touch this case.

There is no authority expressly in point in this case. The matter has to be determined in the exercise of a judicial discretion, having regard to the income of the husband, the principles upon which a wife is entitled to maintenance out

(1) [1891] P. 272, 275. (2) [1898] P. 138. (3) [1897] P. 306.

of her husband's income, and to any agreement that there is between the parties and any relative conduct of the parties. If this is a normal case the husband's income is such that an allowance of 1500*l.* a year would be in accordance with the general practice of the Court in an ordinary case. I have to consider whether any of the other facts of the case to which I have referred take this case out of the exercise of the discretion upon normal lines. There has been no conduct of the wife which should lead the Court in its judicial discretion to diminish her income. As to the scale of living upon which the parties agreed, it was pressed upon me that that really was almost a condition precedent of that marriage. I do not so find. There are letters from the husband to the wife down to a very recent period before the separation which satisfy me that she is right when she tells the Court that throughout the married life the expectation was held out to her that good days were coming when they would be in a far better situation than they were at the time. The view I take of the case with regard to that aspect of it is that this wife is not disentitled to be dealt with on the ordinary footing of a wife, and she has done nothing, and acquiesced in nothing, which should lead me to settle alimony upon any other footing than that which should be settled between a well-to-do wife and a husband who, in the past, has not done his duty.

Having arrived at the conclusion as to what would be in the normal case the income which should be awarded to the wife out of the husband's income, I find that 1500*l.* a year for permanent alimony would be such an income, having regard to the sources and fluctuations of the husband's means, and I so direct.

The husband's counsel asked for and obtained leave to appeal, but no appeal was brought.

Solicitors for husband: *Waltons & Co.*

Solicitors for wife: *Gibson & Weldon, for R. B. Stephenson, Liverpool.*

J. R. B.

C. A.
1923
June 26.

[IN THE COURT OF APPEAL.]

PALMER *v.* PALMER.

Restitution of Conjugal Rights—Wife's Petition—Separation Deed—Bona fides of Applicant—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 17, 22 —*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

Where a husband and wife are living apart under a deed of separation, and the wife, having unsuccessfully endeavoured to induce her husband to resume cohabitation, presents a petition for restitution of conjugal rights, and there is evidence that she sincerely desires the return of her husband, the existence of the separation deed, and the fact that she may have it in her mind, if he disobeys the decree, to take subsequent proceedings for a divorce, constitute no bar to her right to a decree for restitution:—

So *held* by the Court of Appeal, reversing the decision of Shearman J.

Appeal from a decision of Shearman J. sitting at Birmingham Assizes on March 24, 1923, whereby he refused to pronounce a decree upon the wife's petition for restitution of conjugal rights.

The parties were married on August 17, 1917, and subsequently lived together at various places. There was no issue of the marriage. Differences arose between them, and on December 4, 1920, they executed a deed of separation, which the wife alleged she was compelled by her husband to sign. By the deed the husband agreed to pay the wife 3*l.* a week for her maintenance and support subject (inter alia) to the following conditions: (*c*) That neither the wife nor any person on her behalf should at any time molest or disturb the husband, or by any means, either by taking out citation or process, or by instituting any action in England or elsewhere, or in any other manner compel the husband to cohabit with the wife, or endeavour to enforce any restitution of conjugal rights, or to compel the husband to allow any alimony or maintenance further than as therein provided. The parties then separated and the wife went to live with her mother, and the husband continued to pay her the 3*l.* a week. On October 22, 1922, the wife, desiring to return to her husband, wrote to him asking him to resume cohabitation. On

October 26 he replied refusing to do so. In her evidence she stated that she seriously desired to go back to her husband and thought she could now live happily with him. She subsequently wrote further letters to him asking him again to resume cohabitation, but he did not reply to her letters. She then presented her petition for a decree of restitution of conjugal rights. The husband filed no answer to the petition. There was evidence that the husband was living with another woman, but the wife was willing to go back to him and overlook the past.

The petitioner's mother corroborated her daughter's evidence that she still had affection for her husband and really desired to return to him.

Shearman J. declined to grant a decree unless it could be shown that there was real desertion. He said he was convinced that the object was to obtain a divorce.

The wife appealed. The appeal was heard on June 26, 1923.

W. O. Willis for the appellant. The learned judge was wrong in refusing to grant the decree of restitution of conjugal rights on the ground that the parties were living apart under the deed of separation. He suggested there was a lack of bona fides in the application, but it is submitted that bona fides has nothing to do with the appellant's right to a decree.

Before 1857 if a husband refused to live with his wife the old Ecclesiastical Courts made a decree. By s. 22 of the Matrimonial Causes Act, 1857, the Court was to act and give relief on the same principle and rules on which the Ecclesiastical Courts had theretofore acted and given relief subject to the provision of the Act and the rules and orders thereunder. The Matrimonial Causes Act, 1884, s. 5, only provided what should follow upon failure to comply with a decree for restitution of conjugal rights. We are therefore thrown back to the law as it stood in 1857.

[DUKE P. The whole question is whether the judge has refused upon good grounds to make a decree.]

It is submitted there are no grounds at all for his refusal.

C. A. 1923

PALMER v. PALMER.

The appellant was entitled to contemplate the alternative remedy: *Williams* v. *Williams*. (1)

The deed of separation does not constitute a bar to the decree: *Tress* v. *Tress* (2); *Mann* v. *Mann*. (3)

[The respondent was not represented by counsel.]

SIR HENRY DUKE P. This is an appeal in a class of cases which is of frequent occurrence in the Divorce Division. The petitioner sought a decree for restitution of conjugal rights on the ground of refusal of cohabitation. If she had gone to the Court and had concealed the existence of the deed of separation she would have presented a false case and been liable to the intervention of the King's Proctor. But she revealed the deed and, contrary to its provisions, she claimed a decree for restitution. The question whether the existence of the deed of separation constitutes a bar against the granting of a decree for restitution has often been discussed, and in the Ecclesiastical Courts it was not treated as a bar. Sect. 22 of the Act of 1857 provides for the grant of a decree for the restitution of conjugal rights upon the principles of the Ecclesiastical Courts, and, that being so, the law must be considered as it was before the Matrimonial Causes Act, 1857. I think the petitioner has a right to have her cause tried on that footing. The husband did not appear nor set up the deed. The wife appeared and revealed it, and said that she had been coerced into signing it and had made an appeal to the husband to return to her. Under these circumstances if the Court is satisfied of good faith on her part, and that there is evidence that she is really desirous that her husband should return to her, I think she is entitled to the decree for which she asks. What is said by the learned judge in refusing to grant a decree is: "It is not the law that when people enter into a separation agreement they can then have what is called an artificial desertion. I am not going to grant a decree under the circumstances unless it can be shown that there is real desertion. I am

(1) [1921] P. 131. (2) (1887) 12 P. D. 128.
(3) [1922] P. 238.

quite convinced that the object is to get a divorce." I thought at first the learned judge had come to the conclusion that the petitioner was not acting in good faith, but I think there is strong evidence to the contrary, and the judge does not say that he does not believe that evidence. The making of the decree if it has its proper legal effect of a return to cohabitation on the part of the husband will be an impediment to her right subsequently to apply for a divorce upon any ground now known to her. But I fail to see that it is any disqualification of her right to a decree for restitution that she should have it in her mind that she may, if the decree is disobeyed, have recourse to proceedings for a divorce. There I differ from the learned judge. If I had been persuaded that the judge found an absence of bona fides on the part of the wife I should have agreed with him that there could be no decree. As has been often said, bona fides is of the essence of the right to relief, but the fact that, if the husband should not obey the decree, she will take proceedings for a divorce is no disqualification of her right to a decree for restitution of conjugal rights. The appeal must be allowed.

WARRINGTON L.J. I am of the same opinion. With all respect I think the learned judge has failed to see that the position which he has taken up is inconsistent with the desire of the wife that her husband should return to her. The appeal must be allowed.

ATKIN L.J. I think there is no good ground for refusing a decree in this case. If the judge had been satisfied that there was no desire upon the part of the wife to return to her husband that would have been a ground for refusing to grant the decree. Here there is evidence by the wife of her genuine desire that her husband should return to her, and that evidence is corroborated by that of her mother, and the judge does not find against it. All that he says is that the object of the wife is to obtain a divorce. Even if the wife were anxious to get a divorce and to prove desertion in order to obtain it it seems to me that does not disentitle her to the

C. A. 1923

PALMER v. PALMER.

Atkin L.J.

relief she now seeks. She might well say: "If he obeys I shall go back to my husband and make him happy; if he does not I may be compelled to sue for a divorce." It seems to me that that is not an inconsistent attitude or lacking in bona fides or one which disentitles her to the order asked for. If the husband does not obey the decree there is nothing to preclude the wife from applying for a divorce. The appeal must be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for Howard, Cant & Cheatle, Birmingham; Edell & Co.*

G. A. S.

1923

July 24, 26.

PROBATE.

In re EMERY, DECEASED.

EMERY *v.* EMERY.

Probate—Practice—Caveat lodged by undischarged Bankrupt—Application by Plaintiffs for Security of Costs—Effect of Caveat.

A person who has lodged a caveat against probate of a will is not, though his action compels the executors to take proceedings, so much the actor in the proceedings as to be liable to give security for costs. The bankruptcy or insolvency of a defendant is not per se a ground for ordering him to give security for costs.

Lambert v. *Bassett* (1877) Ir. R. 11 Eq. 291 not followed.

Moran v. *Place* [1896] P. 214 applied.

FREDERICK WILLIAM EMERY, the testator in this action, died on April 15, 1923, having by his will, dated January 25, 1923, appointed his wife, one daughter, and his son-in-law, Thomas Somerville, executors and trustees, and gave all his residuary estate to his trustees upon trust for his five daughters or their issue, stating that he had found it necessary to exclude his son, Herbert Rowland Emery, from participation, he having caused the testator serious losses.

The son entered a caveat, and the executors issued a

1923

EMERY, *In re.* EMERY *v.* EMERY.

warning to the caveat, and, on the son's appearing to the warning, commenced this action for probate of the will. Herbert Rowland Emery, who was an undischarged bankrupt and indebted to the testator's estate, was made defendant and appeared in the action on June 30, 1923. On July 10, 1923, the plaintiffs took out a summons asking that the defendant should be ordered to give security for costs. The registrar refused to order security and the executors appealed; the appeal now came on to be heard in Court.

Clifford Mortimer for the plaintiffs. The general rule of the High Court is that a defendant who is brought here against his will is not ordered to give security for costs. But in the Probate Division the rule is that a person who is the actor in the proceedings, and substantially in the position of a plaintiff, will be ordered to give security. That general rule is laid down in *Robson* v. *Robson* (1), though in that case security was not ordered. But in the Irish cases of *Lambert* v. *Bassett* (2) and *In the Goods of Twomey* (3) the rule was applied to a bankrupt caveator in circumstances precisely similar to this case.

J. H. Watts for the defendant. The caveator is not in the position of a plaintiff. The executor must always be the plaintiff in a probate action; the only difference which a caveat makes is that the executor must prove in solemn form and not in common form. There is no real distinction between a defendant who is cited and a caveator. *Robson* v. *Robson* (1) is in my favour, for it shows that a caveator, though out of the jurisdiction, will not be ordered to give security. The Irish case of *Lambert* v. *Bassett* (2) is the only decision to the contrary, but that is not binding on this Court, and is not consistent with the English decisions. The bankruptcy or insolvency of a defendant is not in itself sufficient ground for ordering him to give security for costs: *Rhodes* v. *Dawson* (4); *Denston* v. *Ashton.* (5)

(1) (1864) 3 Sw. & Tr. 568.
(2) Ir. R. 11 Eq. 291.
(3) [1900] 2 I. R. 560
(4) (1886) 16 Q. B. D. 548.
(5) (1869) L. R. 4 Q. B. 590.

1923

EMERY, *In re.* EMERY *v.* EMERY.

[He also referred to *Pooley's Trustee* v. *Whetham* (1) *Swain* v. *Follows* (2); and *Cowell* v. *Taylor*. (3)]

Clifford Mortimer in reply referred to *Goldie* v. *Murray*. (4)

Cur. adv. vult.

July 26. SIR HENRY DUKE P. This is an appeal from a decision of the Senior Registrar refusing to order the defendant to give security for the plaintiffs' costs.

The question arises under somewhat peculiar circumstances. The application for security and the present appeal were founded upon a decision in the High Court in Ireland, which has been accepted in the Irish Courts as of authority in matters such as are here in question. [His Lordship stated the facts and continued:] The Irish case upon which reliance was placed was *Lambert* v. *Bassett* (5), in which the learned judge, Warren J., under circumstances analogous, at any rate, to the circumstances in the present case, ordered the defendant, a caveator who was an undischarged bankrupt, to give security for costs upon pain of discharge of his caveat and discontinuance of the contentious proceedings. That was an authority upon which, no doubt, if it had been a decision in a Court of Probate in this country, this Court would have proceeded, unless the law in the meantime had been otherwise declared and assuming that the practice had proceeded upon the footing of the decision. It was founded in some particulars upon a judgment of Lord Penzance in *Robson* v. *Robson* (6) in 1864, where, in fact, no order for security for costs was made against the defendant who had interposed in a probate suit under circumstances which were alleged to entitle the plaintiffs in the suit to security for costs against him, he being out of the jurisdiction. But the learned judge laid it down that, in questions relating to the right for security for costs in proceedings in probate, the Court would have regard, not to the technical situation

(1) (1884) 28 Ch. D. 38.
(2) (1887) 18 Q. B. D. 585.
(3) (1885) 31 Ch. D. 34.
(4) (1841) 2 Curt. 797.
(5) Ir. R. 11 Eq. 291.
(6) 3 Sw. & Tr. 568.

of the parties in relation to the suit, but to their substantial position and to the question whether, in truth, the party against whom security for costs was demanded was the actor in the proceedings. It is upon that view of the matter that the Court will have regard to the question of who is, in fact, the actor in the proceedings, and upon the application of that principle in the case of *Lambert* v. *Bassett* (1) the plaintiffs in the present action claimed to have security against the defendant.

The position of the matter is that the defendant is the caveator at whose instance proceedings which might otherwise have been non-contentious proceedings have become contentious proceedings, and he was at all material times and is an undischarged bankrupt. The appeal is founded upon the proposition that, given the concurrence of those facts, there is, subject to the discretion of the Court, a right on the part of the plaintiffs to require security for costs against such a defendant.

First, with regard to the position of the defendant as being, as he is alleged to be, the actor in these proceedings, that is, the party by whom the law is set in motion with the result of entailing cost upon other parties, I am not able to take the view that a caveator is an actor in probate proceedings in the sense which is contended for. He is not the person who institutes the suit. It is quite true that his conduct gives cause for the institution of the suit, but he is not in substance and in fact the actor in the proceedings. Regard must be had to the nature of a caveat. It is a warning put upon the file of the Court in the Probate Registry which prevents proceedings to obtain probate or administration except after notice to the caveator. The question whether the filing of a caveat is the institution of a suit, or whether it makes the caveator the actor in the subsequent probate proceedings, was considered in *Moran* v. *Place* (2), which Mr. Mortimer very properly called my attention to, after the conclusion of the argument, as it was an authority against him. Lindley L.J. there said: "A caveat is not a notice to any opponent in

(1) Ir. R. 11 Eq. 291. (2) [1896] P. 214, 216.

1923

EMERY, *In re.* EMERY *v.* EMERY.

The President.

particular. It is a notice to the registrar or officer of the Court not to let anything be done by anybody in the matter of the will, or the goods of the deceased, without notice to the person who lodges the caveat. It is impossible to look at it as commencing any litigation—it merely requests the registrar to tell the caveator if anybody stirs in this matter. That caveat having been entered and there being an address so that the person entering it can be found, the next thing is that somebody does begin to stir in the matter. That is the present plaintiff, who is the executor of the will and wishes to prove it. When a caveat has been entered the person who wishes to prove the will has to warn the person who entered the caveat, and if such person, i.e., the caveator, intends to make any real objection, he enters an appearance. Then, if the litigation goes on, the person who wants to prove the will issues a writ and serves it on the caveator. Then, and not before, there is litigation between the person propounding the will on the one side, and the person opposing it on the other." Then the Lord Justice, proceeding, examines that state of things, and says: "Now, if we look at that state of things quite apart from all technicalities"—that is, looking at it as a matter of substance, as I am rightly told I ought to do—"who is the person who institutes the proceeding? I should say that it is the person who is the actor from the beginning, namely, the plaintiff. It is perfectly true that the person who entered the caveat caused the litigation, but she did not institute the proceeding by herself or anybody acting as her agent. What she did was to force somebody else to institute proceedings against her."

I do not intend to go beyond what is necessary to be said upon the question of what state of facts, either in the High Court generally or in this Division, will put a person who is nominally a defendant under the liability to give security for costs. Conditions do arise under which a person who is nominally a defendant must give security for costs. Any lawyer needs only to look at the authorities upon the subject in the High Court (where the rule is as equitable as it ever

was in the Probate Court) to discover what are the various circumstances under which a person who is nominally a defendant may be treated as being in truth a plaintiff. But the conclusion at which I arrive is that the caveator in this case, with the caveat filed under the ordinary circumstances which entitle a party claiming interest or having an interest to file a caveat, is not the actor in these proceedings in such a way as requires that he, the present party, should give security for costs.

Upon the question of vexatious action of caveators I ought perhaps to add this. Various instances have come to my notice in which the privilege of filing a caveat has been vexatiously used. The Court has abundant means of visiting with costs any party who vexatiously invokes the authority of the Court, or the powers of the Court, by the improper filing of a caveat, and that can be dealt with under the general jurisdiction of the Court.

I have dealt with the matter so far upon the footing that if the now defendant were in truth and in fact the actor in these proceedings, he might be ordered to give security for costs, but I do not so decide. The objection against the present defendant, assuming him to be virtually a plaintiff and the actor in the proceedings, is that he was at all material times and is an undischarged bankrupt. That of itself does not entitle the party who is proceeded against to an order for security for costs. The law and the practice on that subject are set out in a well-known text book, Chitty's Archbold, 14th ed., p. 398: "The Plaintiff will not be compelled to give security for costs merely because he is pauper or bankrupt, or insolvent, and this even in a qui tam action." The ground on which a bankrupt will be required to give security for costs is ordinarily that he is only a nominal plaintiff. If in truth the present defendant were the actor in these proceedings and were maintaining these proceedings, not on his own behalf but for the benefit of some third party, for whose benefit he was using the procedure of the Court, there would be ground for ordering him to give security for costs. If he were a nominal plaintiff, for example, the beneficial

1923

EMERY, *In re.* EMERY *v.* EMERY.

The President.

interest in the proceedings being in a trustee in bankruptcy, an examination of the authorities on the jurisdiction in bankruptcy would show that the law as to after-acquired property is not in so simple a condition as to support the proposition that a bankrupt who has become the next of kin, in the sense in which the term is used in this Court, of a deceased person can only maintain a claim in that capacity for the benefit of his trustee in bankruptcy. It is not necessary that I should determine anything upon that matter. I merely point out that there would be difficulties in the way even if the defendant were substantially a plaintiff in requiring him to give security in the state of facts which here exists. I base my decision upon the view that a caveator in the position of the present defendant, who has been made a defendant because he was a caveator and because of the caveat he had filed, is not a party who, under the practice of the High Court or under any practice which has existed in this Court, can be called upon to give security for the costs, either by reason of insolvency or any other reason.

The appeal must be dismissed with costs.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Foster & Somerville, Torquay.*

Solicitors for defendant: *Charles Ede & Co.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.
1923
May 7, 9;
July 2.

SMITH *v.* SMITH.

Divorce—Maintenance—Order on divorced Husband to secure fixed Sum per Week as permanent Maintenance during Life of Wife—Further Order to pay fixed Sum per Week during joint Lives—Deduction of Income Tax—"Annual payments"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D—Case III.*, 1 (*a*)—*All Schedules Rules, rr.* 19, 21, 23.

By an order of the Divorce Division, a divorced husband was ordered, (1.) to secure the payment to the wife for her life of a weekly sum of 3*l.* by way of maintenance; and (2.) to pay her a further weekly sum of 2*l.* during their joint lives. In compliance with the order the husband duly secured the 3*l.* a week, but in paying both sums he deducted income tax therefrom. Upon an application by the wife for leave to issue execution in respect of the amount of tax so deducted, Hill J. dismissed the summons, and from his decision the wife appealed:—

Held, as to the weekly payment of 3*l.*, that the order appealed from was right. There was no order on the respondent to pay that sum, and no order on which execution could issue against him.

As to the weekly payment of 2*l.*:—

Held, by Lord Sterndale M.R. and Warrington L.J. (Scrutton L.J. dissenting), that the payment was a taxable annual payment within Case III., 1 (*a*), of Sch. D. to the Income Tax Act, 1918, and the respondent was entitled under r. 19 of the General Rules relating to All Schedules, in making the payments to deduct the tax.

Decision of Hill J. affirmed.

APPEAL from the decision of Hill J.

By an order of the Probate, Divorce and Admiralty Division dated November 8, 1920, and made on the petitioner's application for permanent maintenance, it was ordered that the respondent (the divorced husband) do secure to the petitioner as from October 25, 1920, for her life, 3*l.* a week, and further, do pay to the petitioner 2*l.* per week during the joint lives of the petitioner and the respondent. The 3*l.* per week was duly secured. The respondent, in paying both weekly sums, deducted income tax therefrom. He claimed to be entitled to make this deduction under r. 19 of the All Schedules Rules to the Income Tax Act, 1918. The petitioner disputed his right to do so, and took out a summons for leave to proceed to execution in respect of the sums so

C. A. 1923

SMITH v. SMITH.

deducted. This was refused by the registrar, and that decision was affirmed by Hill J.

The petitioner appealed.

Acton Pile for the appellant. The question is whether the sum ordered to be paid to the wife is a sum certain and not one from which the husband is entitled to make any deduction under r. 19 of the Rules to All Schedules to the Income Tax Act, 1918, which is substantially the same as s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35). It has been held that the section does not allow a husband to deduct income tax from any money ordered to be paid by the Divorce Court. In *Pemberton* v. *Pemberton* (1), which was decided almost immediately after the Act of 1842 was passed, it was however held that in payments on account of alimony, the party paying might deduct income tax; but at the time when the alimony was allotted in that case no income tax was in existence.

In *In re Shaw* (2) it was held that orders of the Divorce Division directing payment of alimony or permanent maintenance free of income tax were not within s. 103 of the Income Tax Act, 1842, and therefore that the practice with regard to them had no application to cases where the payments were made in pursuance of contracts.

In *Blount* v. *Blount* (3) it was held that a covenant to pay a quarterly sum "free of income tax" was void under s. 103 of the Income Tax Act, 1842, and that the defendant was therefore free to make the deduction.

Here the money was payable under an order of the Divorce Court, and not under a contract, and therefore income tax was not deductible.

It is submitted (1.) that the Income Tax Acts do not affect orders of the Divorce Court, and (2.) that an order made by the registrar for the payment of alimony or maintenance should be made after providing for all King's taxes, and that what is ordered to be paid should be a clear sum. The order

(1) (1842) 2 Notes of Cases, 17. (2) [1918] P. 47.
(3) [1916] 1 K. B. 230.

involves the payment of a clear sum, and no deductions from it should be made although the order does not in terms say so. *Frankfort* v. *Frankfort* (1) shows the principle upon which alimony is calculated.

It must be assumed in this case that the registrar, in fixing the sum to be paid, has taken the income tax into consideration, and it ought not to be paid over again by deduction from the sum ordered to be paid.

In *In re Barry's Trusts* (2) Kekewich J. made inquiries as to the practice of the registrars in making these orders.

In *Dayrell-Steyning* v. *Dayrell-Steyning* (3) Duke P. said: "I have considered what is the proper mode of dealing with that question, and the result of a fair consideration of the two questions seems to me to be this: (1.) In ascertaining the husband's total income, his liability for all the King's taxes must be taken into consideration, in order to arrive at the amount in truth disposable by him for his own purposes; (2.) as to the proportion of the income allotted to the wife by way of maintenance, if the husband's liabilities for taxation are to be taken into account, the wife's liabilities must be taken into consideration also. The sum should be worked out in this way: In ordinary cases, where one-third of the husband's income is allotted to the wife by way of maintenance, the amount allotted should be such a sum free from income tax and super tax as will amount to one-third of the total fund, that fund also being discharged from King's taxes. The distributable fund should be tax free, and the relative proportion should also be tax free." That passage shows the principle upon which the registrars are supposed to act.

A third point is that whatever may be the practice of the Divorce Court it only deals with the question when no difficulty arises as to what is the net amount of the husband's income. Here the registrar was unable to get at the amount of the husband's income.

In *Burroughes* v. *Abbott* (4) P. O. Lawrence J. referred to

(1) (1845) 4 Notes of Cases, 280.
(2) [1906] 1 Ch. 768.
(3) [1922] P. 280, 282.
(4) [1922] 1 Ch. 86, 94.

C. A. 1923

SMITH v. SMITH.

In re Shaw (1) as showing that the prohibitions of the Income Tax Acts against the payment of annuities free of income tax do not apply to orders of the Divorce Court.

Bayford K.C. and *D. Cotes-Preedy* for the respondent. The husband is in fact paying the income tax for the wife, and she can get it back again.

[SCRUTTON L.J. If she were living with the husband he would not be able to deduct it.]

There is no provision that a divorced woman to whom an annuity is payable is not liable to pay income tax: *Pemberton* v. *Pemberton*. (2)

[WARRINGTON L.J. Sect. 102 of the Act of 1842 is substantially the same as r. 19 of the All Schedules Rules to the Act of 1918 in showing what deductions can be made.]

There is no hardship in placing a divorced wife in the same position as any other person who has to recover income tax. She would be liable to the revenue if she were paid in full.

[The Court directed that the further hearing of the case should be adjourned till May 9 for Scrutton L.J. to see the registrar in order to ascertain from him whether, in fixing the amount of the sum to be paid by the husband by way of maintenance, income tax had been taken into consideration.]

May 9. SCRUTTON L.J. stated the result of his interview with the registrar, from which it appeared that having regard to the uncertain nature of the respondent's income, he did not order payment of a proportion of it, and did not consider the question of income tax, but fixed what he thought was a fair sum to be paid to the wife in the circumstances.

Bayford K.C. (*D. Cotes-Preedy* with him) for the respondent. There is no order upon the respondent, or covenant by him to pay the 3*l.* a week. He was merely ordered to secure the payment, and he has complied with the order by doing so. The wife, if she does not get paid, must look to her security

(1) [1918] P. 47. (2) 2 Notes of Cases, 17.

under the deed. The respondent in making the payment of the 3*l.* was entitled to deduct the tax, leaving the petitioner to reclaim the amount if she could lawfully do so.

As to the 2*l.* a week the position is different.

[LORD STERNDALE M.R. Is not the question whether the 2*l.* a week is an annual payment within the Income Tax Act, 1918, Sch. D, Case III., 1 (*a*) ?]

It is so submitted. If the case is not within r. 19 of the General Rules it comes within r. 21.

[*In re Peck's Settlement* (1) was also referred to.]

Acton Pile in reply referred to *Campbell* v. *Campbell*. (2)

Cur. adv. vult.

1923. July 2. LORD STERNDALE M.R. The question on this appeal arises out of an order for permanent maintenance made by the Probate, Divorce and Admiralty Division after a divorce. The order is as follows (so far as it is necessary to read it): "That the respondent do secure to the petitioner as from the 25th day of October 1920 for her life 3*l.* per week and further do pay to the petitioner 2*l.* per week during the joint lives of the petitioner and respondent." The respondent has secured the 3*l.* a week to the satisfaction of the Court. I need not read the deed by which the security is given, it is enough to say that the respondent is entitled under it to the income of the securities so long as he continues to pay the 3*l.* a week to the appellant. He is, however, under no personal liability to pay the 3*l.* a week by agreement or by order of the Court or otherwise, and if he fails to pay that sum the appellant can resort to and enforce the security, and that is her only right. The 2*l.* a week, on the other hand, is payable under the order of the Court.

The respondent in paying the two sums of 3*l.* and 2*l.* claims to deduct and has deducted income tax. The appellant objected to these deductions, and applied to the Probate, Divorce and Admiralty Division for leave to issue execution on the order. This was refused by the registrar, and his

(1) [1921] 2 Ch. 237. (2) [1922] P. 187, 193.

C. A. 1923

SMITH v. SMITH.

Lord Sterndale M.R.

decision was affirmed by Hill J. As to the 3*l.* the order seems to me to be obviously right apart from any question of the Revenue Acts. There was no order on the respondent to pay any sum, and no order upon which execution could issue, and the respondent has done all that he was required to do in respect of that payment by securing it as ordered. If the appellant has not been duly paid her remedy is to enforce the security.

The question as to the 2*l.* stands on a different footing and is more difficult. It requires a consideration of the Revenue Acts, the question being, as it seems to me, whether the payment is taxable income of the appellant under Case III., 1 (*a*), of Sch. D of the Income Tax Act, 1918, and whether the respondent as the person paying that sum is entitled to deduct the tax under r. 19 of the General Rules relating to All Schedules.

The question is important, although the amount at stake in this appeal is small; but its importance is lessened by the fact that it is competent to the Court, in ordering payments in respect of permanent maintenance, to make them payable free of income tax when that is the intention: see *Burroughes* v. *Abbott.* (1)

The first question is whether the payment is an annual payment within Case III., 1 (*a*), of Sch. D. I can see no reason why it is not. It is no doubt payable weekly, but that fact does not prevent it from being an annual payment if the weekly payments may extend beyond a year: see *In re Cooper* (2) and *In re Janes' Settlement* (3), decisions with which I agree.

It was however argued that although it might be an annual payment it was not taxable as profit against the appellant under Sch. D. No doubt the words profits and gains are not the most suitable words to describe such a payment, but it is clear that annuities and annual payments are for some purposes profits and gains within the meaning of the Schedule, though probably, in ordinary language, those words would

(1) [1922] 1 Ch. 86. (2) [1917] W. N. 385.
(3) [1918] 2 Ch. 54.

not be used to describe them. Unless therefore there is something in the nature of this particular payment which leads to an opposite conclusion it seems to me clearly within the Schedule. It is a personal allowance made by the husband to his wife under the order of the Court: *Watkins* v. *Watkins* (1); it is inalienable: *Watkins* v. *Watkins* (1) and *In re Robinson* (2); and it is liable to alteration or termination by order of the Court. It is true that voluntary allowances are not in practice taxable, though I do not know of any case which lays down the principle on which they are exempted; it may be because as suggested by Warrington L.J. in his judgment, to be delivered directly, such allowances are considered as a series of gifts and not annual payments at all. At any rate this is not a voluntary allowance, and therefore does not come within the principle, whatever it is. The fact that it is inalienable does not seem to me to be important; many inalienable payments are taxable, for example, inalienable pensions, and I do not see that the fact that it can be increased, reduced or terminated by the Court makes it less a taxable annual payment so long as it continues.

Lastly the words "whether such payment" down to the word "contract" in the Schedule do not seem to me to exclude from taxable annual payments all payments that cannot be brought within those particular words. I think therefore that this is a taxable annual payment within Case III., and the only question is whether the respondent is entitled to deduct the tax under r. 19.

It seems to be established that if the maintenance be ordered as a part of the husband's income after all tax has been deducted he cannot then himself deduct tax from the payment, and the learned President in *Dayrell-Steyning* v. *Dayrell-Steyning* (3) seems to decide that such is the proper way of fixing the payment. We thought it right therefore to ask the learned registrar, who made the order, on what basis he had fixed the payment, and he told us that in

(1) [1896] P. 222. (2) (1884) 27 Ch. D. 160.
(3) [1922] P. 280.

C. A. 1923

SMITH v. SMITH.

Lord Sterndale M.R.

consequence of the uncertain nature of the respondent's income he did not order payment of a proportion of it and did not consider the question of income tax, but fixed what he thought was a fair sum in the circumstances. There is therefore in my opinion nothing to prevent the respondent from deducting the tax in accordance with what I understand to be the general practice in the Probate, Divorce and Admiralty Division (see decision of Mr. Registrar Barnard on this application adopted by Hill J.). The appeal must be dismissed with costs.

WARRINGTON L.J. By an order of the Probate, Divorce and Admiralty Division dated November 8, 1920, and made on the petitioner's application for permanent maintenance, it was ordered that the respondent (the divorced husband) do secure to the petitioner as from October 25, 1920, for her life 3*l.* per week, and further do pay to the petitioner 2*l.* per week during the joint lives of the petitioner and the respondent.

The 3*l.* per week was duly secured according to terms agreed upon. As to this it is to be observed that the respondent has thus completely performed the obligation imposed upon him by the order. He is not either by force of the order, or by the terms of the agreement for security, under any personal liability to pay this weekly sum. The petitioner in default of payment by him can resort to the security, but that is her only remedy.

The respondent in paying both weekly sums claims to be entitled to deduct income tax. The petitioner, desiring to dispute his claim, sought to raise the question by a summons for leave to proceed to execution in respect of the sums so deducted. Hill J. has dismissed the summons, being of opinion that the deductions were rightly made. The petitioner appeals.

With regard to the 3*l.* a week the order of the learned judge by which he dismissed the application was clearly right. In the first place the summons was altogether misconceived, inasmuch as the order of November 8, 1920, had

C. A. 1923

SMITH v. SMITH.

Warrington L.J.

been fully complied with so far as the 3*l.* per week was concerned and there was nothing for which execution could issue. Besides this technical reason, on the merits the order was right, because the payments depending only on the terms of the contract for security, they are subject to the provisions of the Income Tax Act, 1918, and under r. 19 of the Rules applicable to All Schedules the respondent paying the weekly sum is entitled to deduct the tax, and under r. 23 the petitioner is bound under penalty to allow the deduction, and any agreement to the contrary is void : see *In re Shaw* (1) and *Blount* v. *Blount.* (2)

As to the 2*l.* per week in respect of which the obligation to pay depends upon the order and is a personal obligation and binding on the respondent the question is not so easy.

In the first place it is said that the order must be construed as being an order to pay the 2*l.* free of income tax, it being the practice of the Court to arrive at the proportion payable for maintenance of the husband's income after deducting income tax, and such income tax ought not to be deducted twice over, as it would be if it were deducted from the sum allowed for maintenance : see *Dayrell-Steyning* v. *Dayrell-Steyning* (3) and *Frankfort* v. *Frankfort.* (4) The answer to that contention seems to me to be afforded by the answer given by the registrar to the inquiries we made, by which it appears that for reasons which to him appeared satisfactory the 2*l.* per week was not fixed as a certain proportion of the husband's income after deducting tax, and the foundation for the argument therefore disappears.

But then, it is said, a payment of this description is not subject to income tax at all. This argument is founded on the nature of permanent maintenance as described by authority. In *In re Robinson* (5), dealing with permanent alimony awarded after a decree for judicial separation, Cotton L.J. says this : "The very nature of alimony is inconsistent with its being capable of assignment. We are

(1) [1918] P. 47.
(2) [1916] 1 K. B. 230.
(3) [1922] P. 280.
(4) 4 Notes of Cases, 280.
(5) 27 Ch. D. 160, 164.

C. A. 1923

SMITH v. SMITH.

Warrington L.J.

familiar with instances of allowances which are not alienable in the case of men, such as the half-pay of the officers in the Army and Navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time, and the Court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the Court from time to time to provide for the maintenance of the wife. Therefore it was not assignable by the wife." In the same case Lindley L.J. in coming to the same conclusion said that alimony is only an allowance made by the Court and is revocable by the same Court.

In *Watkins* v. *Watkins* (1) this Court decided that a sum ordered to be paid for the permanent maintenance of a divorced wife is also a purely personal allowance, and so long as the order subsists can neither be alienated nor released. Lindley L.J. in the course of his judgment (2) thus describes the payment with which he was dealing: "The payments to be made to the divorced wife are to be for her maintenance and support. This language points to a purely personal allowance. Such allowances are by no means unknown to the law. Alimony is one instance. An officer's full or half pay is another. It is true that in a case like this the Court has no power to increase the allowance once made, and there is good reason for this; for, the marriage bond being at an end, there is no reason why the woman's allowance should increase with her late husband's means. On the other hand, if he cannot pay the allowance fixed by the Court, the Court can reduce it or suspend its payment, or even discharge the order for maintenance, and so release the husband altogether."

The only point actually decided in these cases was that the allowance is inalienable, but at the same time it is laid

(1) [1896] P. 222. (2) [1896] P. 226.

down, correctly as I understand, that the Court has power to reduce it, suspend its payment or even discharge the order altogether. The question we have to determine is a different one—namely, is a periodical payment of such a nature an " annual payment " within the meaning of Case III., 1 (*a*), under Sch. D of the Income Tax Act, 1918? There is no authority directly in point. It has, however, I think been assumed hitherto that an allowance for permanent maintenance would be liable to income tax unless the order in express terms or on its true construction on the principles referred to above directed that it should be free from income tax (see particularly the judgment of the President in *Dayrell-Steyning* v. *Dayrell-Steyning* (1)). Still the assumption may be ill founded, and being challenged has to be considered.

The fact that the obligation to pay is imposed by an order of the Court, and does not arise by virtue of a contract, does not in my opinion exclude the payment from the operation of the Income Tax Acts. The words in Case III., 1 (*a*), " whether such payment " and so forth do not in my opinion limit the annual payments to those there mentioned, but merely provide that they at all events shall be included.

Again the fact that the payment is to be made weekly does not prevent it from being annual provided the weekly payments may continue beyond the year. The words of the " Case " seem to me to make this clear, and the point has been twice decided by a judge of first instance—by Sargant J. in *In re Cooper* (2) and by Astbury J. in *In re Janes' Settlement.* (3) I see no reason to differ from these decisions.

Then is it other than an annual payment within the Act because it is inalienable ? I can see nothing in the Act to justify this view. On the contrary I think it is quite clear that the inalienable nature of an annuity does not exempt it from tax. Under Sch. E every annuity, pension or stipend payable by the Crown is subject to tax, and it is well known that many of such pensions at all events are inalienable :

(1) [1922] P. 280, 282. (2) [1917] W. N. 385.
(3) [1918] 2 Ch. 54.

C. A. 1923

SMITH v. SMITH.

Warrington L.J.

see per Lindley L.J. in *Watkins* v. *Watkins* (1) and per Cotton L.J. in *In re Robinson.* (2)

Lastly, is it free of tax because it is liable to be reduced, suspended or released by the Court? With all respect to those who take the opposite view I cannot think so. So long as the order stands the 2*l.* per week is payable during the joint lives of husband and wife, and it is not a voluntary payment or allowance. It is true it cannot be recovered by ordinary execution without leave of the Court, but with such leave it can be so recovered.

It is true that in Sch. D the subject of taxation is described in general terms by the expression "profits and gains," an expression hardly appropriate to such a payment as that in question; but when the subject of taxation is more specifically described under the several cases it is found that it includes annual payments in the widest sense.

A merely voluntary payment is in my opinion on a different footing. Although described as so much a year it really consists of a succession of gifts, the making of each one of which is dependent on the will of the donor.

For these reasons I think the order appealed from was right and the appeal should be dismissed.

SCRUTTON L.J. I regret that with part of the judgment which has been delivered I am unable to agree. I also regret that counsel who argued this case would probably not recognize any part of the judgments as having any relation to the arguments they addressed to us. I regret that because I think the nature of these orders and the legal questions arising on them have not been appreciated below or in the arguments which were addressed to us.

This case raises the old question of deduction of income tax from sums due for alimony or maintenance in the Divorce Court.

The husband was ordered (1.) to secure to the wife by way of maintenance after divorce 3*l.* per week for her life, and (2.) to pay her 2*l.* a week during their joint lives. He

(1) [1896] P. 222. (2) 27 Ch. D. 160.

complied with the first order by executing an assignment and deed of covenant under which certain shares were assigned to two trustees to hold them absolutely for the husband so long as he paid 3*l.* a week to the wife, and if he failed to make such payment to apply the income or capital for that purpose. There was however no order on the husband to pay 3*l.* a week, only to secure it; nor any personal covenant by him to pay. The husband in fact deducted income tax from both the 3*l.* and the 2*l.*, whereupon the wife took out a summons for leave to proceed to execution for arrears of maintenance, which was dismissed by the master and the judge.

It was apparently overlooked that there was no order on the husband to pay 3*l.* on which execution could be issued. This would be in itself a reason for dismissing the appeal against Hill J.'s order, though on other grounds than those on which that order proceeded. But if there were a covenant by Smith or the trustee, we should be bound by *In re Barry's Trusts* (1) to hold that the covenantor could deduct income tax from his payments under the deed, even if that deed were expressed "free of Income Tax." This is the result which followed in *Blount* v. *Blount* (2), in which case, however, there was an order of the Divorce Court to pay, under which, as appears from the judgment in *In re Shaw* (3), the amount was collected free of income tax. In this case there is no such order to pay, and the decisions in *Barry's Trusts* (1) and *Blount* v. *Blount* (2) would support the order of Hill J., on the assumption made as to the 3*l.*

We consulted the registrar who made the order as to whether in fixing the amount he had considered the husband's income as net after he had paid income tax, or gross before paying income tax. In the former alternative Sir H. Jenner Fust's decision in *Frankfort* v. *Frankfort* (4) would appear to show that the husband could not deduct income tax from payments of maintenance or alimony. But the registrar informed us that he had not taken income tax into

(1) [1906] 2 Ch. 358.
(2) [1916] 1 K. B. 230.
(3) [1918] P. 55.
(4) 4 Notes of Cases, 280.

C. A. 1923

SMITH v. SMITH.

Scrutton L.J.

consideration at all, or indeed taken any proportion of the husband's income under the peculiar circumstances of the case.

This faces the Court with the simple question: when the Divorce Court orders the husband to pay permanent alimony after a judicial separation, or maintenance after a divorce, can the husband deduct income tax from such payments. Alimony or maintenance, as stated by Cotton L.J. in *In re Robinson* (1), by Lindley L.J. in *Watkins* v. *Watkins* (2) and Sir Henry Duke in *Campbell* v. *Campbell* (3) is a personal allowance to be paid by the husband for the maintenance and support of the wife. It is neither the property of the wife, nor a debt due from the husband. The wife cannot alienate it, nor can she issue execution for it without the leave of the Court. The Court never loses control of it, and can alter it or take it away at any time. Is such a purely personal allowance entirely depending on the control of the Court annual profits or gains of the wife chargeable under Sch. D, from which the husband paying can deduct income tax under either r. 19 or r. 21 of the General Rules of the Income Tax Act, 1918? The sections which rr. 19 and 21 replace were considered by this Court in *Earl Howe* v. *Inland Revenue Commissioners* (4), where it was pointed out that not all annual payments were liable to deduction, but only those which were part of the taxable income of the recipient. Now not all receipts are part of the taxable income of the recipient; for instance voluntary allowances are always assessed and taxed in the hands of the payer, not in those of the recipient. I know of no case deciding this, but I know that this is the practice of the Inland Revenue. The only cases that I am aware of where voluntary gifts are treated as taxable income are those where the gifts are received by virtue of an office under Sch. E: see *Herbert* v. *McQuade* (5) and the cases cited therein. In my view the personal allowance to a wife, which is not her property

(1) 27 Ch. D. 160, 164.
(2) [1896] P. 222, 226.
(3) [1922] P. 192.
(4) [1919] 2 K. B. 336.
(5) [1902] 2 K. B. 631.

or a debt due to her, or legally alienable or recoverable by her without the leave of the Court, is not her profits for income tax purposes, and therefore not an annual payment from which the payer can deduct income tax. She is of course liable to pay income tax on the sum as part of her income, as he would be on sums spent on the maintenance of the wife living with him.

In my view therefore the appeal should be allowed as to the 2*l.* a week, and for the reasons stated disallowed as to the 3*l.* a week. The question whether any relief can be obtained on the lines pursued in *Burroughes* v. *Abbott* (1) is not before us. Under the rules of practice laid down by Sir Henry Duke in *Dayrell-Steyning's Case* (2), the propriety of which is also not before us, the question will apparently not arise in future. It certainly seems odd that where a fixed sum is allowed by the Court for the maintenance of the wife, a lesser sum should be paid because of Government taxation, even if that sum deducted can be recovered later from the Revenue authorities, for the sum named in the order will not be paid as and when ordered.

Appeal dismissed.

Solicitors: *Percy Haseldine & Co., for W. E. Price, Leicester; H. W. Clarkson, for Herbert, Simpson & Bennett, Leicester.*

(1) [1922] 1 Ch. 86. (2) [1922] P. 282.

G. A. S.

1923
June 15;
July 2.

ADMIRALTY.

THE KOURSK.

Shipping—Collision—Innocent Ship damaged by two wrongdoing Vessels—Judgment recovered against one Tortfeasor—Judgment unsatisfied—Right of subsequent Recovery against other Tortfeasor—Test of a joint Tort.

The test of whether damage which flows from the negligent navigation of two ships constitutes a joint tort, so that recovery of judgment against one joint tortfeasor would at common law prevent a later recovery of judgment against the other, is whether the wrongdoing ships were participating in one act of negligence or whether they were by separate acts of negligence combining to produce the same damage. To constitute a joint tort there must be one damnum and one injuria:—

Quaere, whether the common law rule as to joint tortfeasors applies in Admiralty.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship or vessel *Itria*.

The defendants were the owners of the steamship or vessel *Koursk*.

On April 18, 1918, the steamships *Itria*, *Clan Chisholm*, and *Koursk* formed part of a convoy steaming under escort in the Mediterranean. In these circumstances a collision occurred between the *Koursk* and the *Clan Chisholm*, and the latter vessel, continuing her headway, then ran into and sank the *Itria*. On May 29, 1918, the owners of the *Itria* issued a writ against the owners of the *Clan Chisholm*, and the latter by their defence in that action attributed the blame for that collision entirely to the *Koursk*. On August 2, 1918, the owners of the *Itria* issued a writ in rem against the owners of the *Koursk*, but they did not arrest the *Koursk*, because the Admiralty Court, in cross-actions between the *Clan Chisholm* and the *Koursk*, had decided that a warrant of arrest against the *Koursk* could not be issued, upon the ground that the *Koursk*, which belonged to the Russian Volunteer Fleet, was at the time in the employ of the British Government. The action of the *Itria* against the *Clan Chisholm* proceeded and was tried at the same time as the cross-actions between the *Clan Chisholm* and the

1923

THE KOURSK.

Koursk. On March 25, 1919, judgment was delivered pronouncing the *Clan Chisholm* in fault for the collision with the *Itria*, on the ground that she failed to reverse, and also holding both the *Clan Chisholm* and the *Koursk* to blame for the first collision. The owners of the *Clan Chisholm* thereupon limited their liability, and the owners of the *Itria*, being therefore unable to obtain full satisfaction of their judgment, on February 27, 1923, arrested the *Koursk*, which had in the meantime been released from British Government control. The present action came on for hearing on June 15, 1923, when Hill J. pronounced the *Koursk* also to blame for the collision between the *Clan Chisholm* and the *Itria*.

By para. 13 of their defence, however, the owners of the *Koursk* pleaded that "the plaintiffs in the present action have recovered judgment against the owners of the *Clan Chisholm* for the damage which the present plaintiffs sustained by reason of the collision between the *Itria* and the *Clan Chisholm*, and the present defendants say that if, contrary to their contentions, the navigation of the *Koursk* was in any way responsible for the loss of or damage to the *Itria*, the said plaintiffs have suffered damage by reason of a joint tort committed jointly by the owners of the *Clan Chisholm* or their servants and the owners of the *Koursk* or their servants, and have recovered judgment against one of the said joint tortfeasors, and are not now entitled to proceed against the other." This point of law was argued on July 2.

Laing K.C. and *Dumas* for the defendants. The combined negligence of the *Koursk* and the *Clan Chisholm* produced the one damage. The negligence of either vessel, taken separately, would not have brought about this collision. In a number of cases in Admiralty the persons in charge of two ships, each separately negligent, and the combined negligence producing one damage, have been spoken of as joint tortfeasors: see *The Avon* and *The Thomas Joliffe* (1);

(1) [1891] P. 7.

1923

THE KOURSK.

The Englishman and *The Australia* (1); *The S.S. Devonshire* v. *The barge Leslie* (2); *The W. H. No.* 1 and *The Knight Errant* (3); and *The Frankland.* (4) The plaintiffs have already recovered judgment for this one damage against the owners of the *Clan Chisholm*, and it is a well-established rule of common law, which applies also in Admiralty, that judgment against one joint wrongdoer, even though it is not satisfied, releases all the other wrongdoers: see *Brinsmead* v. *Harrison.* (5)

D. Stephens K.C. and *Darby* for the plaintiffs. It is difficult to see how persons navigating different ships can be guilty of joint negligence. In the Admiralty cases upon which the defendants rely the Court was not considering the question now to be determined, and the word "joint" was loosely used. In each case the judgment would have been the same if the word "joint" had been omitted. The form of pleading affords a good test of whether the tort is joint, because if it be a joint tort the same averment would be good against both defendants. In the present case the plaintiff has had to make totally different charges against the two wrongdoing vessels and to rely on separate causes of action. In any event the common law rule as to joint tortfeasors does not apply and never has been applied in the Admiralty Court. Its application would lead to grave injustice and inconvenience, particularly in cases where one of two wrong-doing ships might remain outside the jurisdiction indefinitely.

[They referred to *Thompson* v. *London County Council* (6); *Sadler* v. *Great Western Ry. Co.* (7); *Morris* v. *Robinson* (8); and *Goldrei, Foucard & Son* v. *Sinclair.* (9)]

Laing K.C. in reply.

HILL J. In this case there remains open for decision, and I have now to decide, the plea which was set out in para. 13 of the defence of the owners of the *Koursk*. In order to

(1) [1895] P. 212.
(2) [1912] A. C. 634.
(3) [1910] P. 199.
(4) [1901] P. 161.
(5) (1872) L. R. 7 C. P. 547.
(6) [1899] 1 Q. B. 840.
(7) [1896] A. C. 450.
(8) (1824) 3 B. & C. 196.
(9) [1918] 1 K. B. 180.

understand the point which has to be decided, I will repeat the dates which are relevant.

On April 18, 1918, a collision took place between the *Clan Chisholm* and the *Koursk*, and almost immediately afterwards the *Clan Chisholm* collided with and sank the *Itria*. The owners of the *Itria*, who are the present plaintiffs, issued a writ against the *Clan Chisholm* on May 29, 1918, and in that action, when the defence came to be delivered, the owners of the *Clan Chisholm* put the blame entirely on the *Koursk*. Upon that the plaintiffs issued a writ in rem against the owners of the *Koursk* on August 2, 1918. They did not arrest or seek to arrest the *Koursk*, probably for the reason that this Court in an action between the *Clan Chisholm* and the *Koursk* had decided that a warrant of arrest against the *Koursk* could not be issued upon the ground that she was in the employ of the British Government. The writ of the present plaintiffs, the owners of the *Itria*, against the *Koursk* was served on February 25, 1919, and an appearance was entered on March 5, 1919. The action of the plaintiffs against the owners of the *Clan Chisholm* proceeded and was tried at the same time as cross-actions between the *Clan Chisholm* and the *Koursk*. That trial was on March 14, 1919. On March 25, 1919, this Court gave judgment for the plaintiffs, the owners of the *Itria*, against the *Clan Chisholm*. and also pronounced a judgment of both to blame in the consolidated action of the *Koursk* and *Clan Chisholm*, That went to the Court of Appeal, and the judgment was varied. It went to the House of Lords, where the judgment of this Court was restored, on February 17, 1920. On March 5, 1920, the *Clan Chisholm* brought an action for limitation of liability in respect of the collision with the *Itria*. A decree was made on June 21, 1920, and the registrar's report in favour of the owners of the *Itria* was made on November 29, 1920. It may be supposed from the fact that the *Itria* was sunk, that the *Clan Chisholm's* limitation amount fell very far short of satisfying the damage suffered by the present plaintiffs. The only other date I need mention is, I think, that in this year

1923

THE KOURSK.

Hill J.

—on February 27—the *Koursk* was arrested in the present action, and the pleadings were all in this year. The reason why the *Koursk* was not arrested sooner was that until a decision in the Commercial Court (which I think was given this year) it was not apparent that the *Koursk*, amongst other ships said to belong to the Russian Volunteer Fleet, were free from British Government control. The present suit was heard by me last month and I found the *Koursk* to blame. I had already found in the previous action the *Clan Chisholm* to blame. The question which now arises is this: The plaintiffs, having recovered judgment against the *Clan Chisholm*, can they now recover judgment against the *Koursk*? If both actions had been tried together then of course the plaintiffs would have recovered judgment against both the owners of the *Koursk* and the owners of the *Clan Chisholm*, and each of those defendants would have been liable for the full amount of the plaintiffs' damages. But what is said is that inasmuch as on March 25, 1919, the plaintiffs recovered judgment against the owners of the *Clan Chisholm* their right to recovery against the owners of the *Koursk* was then and there determined. As I understand it is not disputed that at common law if the tort of the *Koursk* and the *Clan Chisholm* in damaging the *Itria* is one, then recovery of judgment by the plaintiffs against the *Clan Chisholm*, whether satisfied or not, will prevent a later recovery against the *Koursk*.

I am here using figurative language, I know, for brevity. Of course when you talk of a ship you ought really to talk of the owners of the ship, but no one will misunderstand me when I speak of the tort of the *Koursk* and of the *Clan Chisholm* and of recovery of the one against the other. That really raises this point: was the tort of the *Koursk* and of the *Clan Chisholm* one or two? The damage is one, of that there is no doubt, but damage is only one element in the tort. It is an action of negligence. Perhaps it may be framed as an action of trespass, but in the form in which it is always launched in this Court it is an action on the case in negligence. The tort is negligence

1923

THE KOURSK.

HILL J.

causing damage, and in my view to make the tort one both elements must be one. There must be one injuria causing one damnum. It is not always easy to distinguish, in cases where a wrong has been committed by more than one person, whether the wrong is one wrong in which two co-operate, or separate wrongs which combine to produce one damage. Some of the cases referred to are of course simple enough. Take *Brinsmead* v. *Harrison* (1), a case of detinue—the detinue of a single article by one man by the orders of another—that is a simple case of a single act. Another case that has been referred to, *Sadler* v. *Great Western Ry. Co.* (2), is a clear case of nuisance by the neighbours on either side. Nobody has been able to find any case in which the matter has been decided where the plaintiff has complained of negligence. Mr. Laing has referred me to several cases in the Admiralty Division which I will mention. Mr. Stephens referred me at the last hearing to expressions in a judgment of Collins L.J., but there is no decision. You may say at any rate of these common law cases that they do not treat it as obvious that where there is one damage two negligences which combine to produce it cannot be separate torts. In *Thompson* v. *London County Council* (3) there were two separate actions of negligence, but in dealing with the matter Collins L.J. says: "An argument was presented to us which, it appears to me, was based upon a fallacy—that was that because the plaintiffs had claimed only one damage that therefore their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the injuria is another. What constitutes the cause of action is the injuria, the wrong done by a separate tortfeasor; and when we analyse this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts which were done, the one by the London County Council and the other by the New River Company, are entirely disconnected torts—

(1) L. R. 7 C. P. 547. (2) [1896] A. C. 450.
(3) [1899] 1 Q. B. 840, 844.

1923

THE KOURSK.

HILL J.

each of them a separate injuria—if it be injuria at all—quite distinct one from the other." In *Bullock* v. *London General Omnibus Co.* (1) the point that is now raised was argued at considerable length. That was an action of negligence in the driving and management of land vehicles. The plaintiff, who was injured, had joined both the omnibus company and the owners of a cart, and the statement of claim alleged that the plaintiff had received personal injuries from their joint negligence, and, alternatively, that he had suffered from the separate injuries of each of the defendants. Negligence was found against one and the question arose about costs. There was what the Master of the Rolls described as an elaborate argument, based upon the contention that there were two separate causes of action and that they never ought to have been joined in one action. What the Master of the Rolls said was: "An elaborate argument has been addressed to us upon another point which is said to afford a ground for impugning the order, the point being that there had been a misjoinder of separate causes of action. If in fact there was such a misjoinder, it was for the defendants to take steps to remedy it; no such steps were taken and it is much too late to complain of the irregularity if there was one." The Court did not decide whether they were separate causes of action or not—it merely said it was too late to take the point. The matter was argued at length, and it would have been a simple answer to the argument to say: "this was a joint tort." We do not get much from the common law cases except that we cannot find any case of an action for negligence in which the doctrine contended for by Mr. Laing has been applied. There are certain Admiralty cases to which Mr. Laing very properly referred me in which apparently the persons in charge of two ships, each separately negligent, and the negligence producing one damage, have been spoken of as joint tortfeasors. In two of those cases—*The Avon* and *The Thomas Joliffe* (2) and *The Englishman* and *The Australia* (3)—it seems pretty clear that the language

(1) [1907] 1 K. B. 264, 270. (2) [1891] P. 7.
(3) [1895] P. 212.

1923

THE KOURSK.

Hill J.

which was used was quite adequate to indicate that the act or neglect was joint. It was a case of master and servant—tug and tow—co-operating in one case in excessive speed and in the other in entering or leaving a dock at an improper time. There was no question that the act was joint and that two people were co-operating. In *The S.S. Devonshire* v. *The barge Leslie* (1) and *The W. H. No.* 1 and *The Knight Errant* (2), and I think in *The Frankland* (3), that cannot be said. The acts producing the one damage seem to have been separate, though, being combined, they produced one damage. The combined effect was one damage. In the House of Lords, in the case of *The S.S. Devonshire* v. *The barge Leslie* (1), Lord Atkinson treated the delinquents as joint tortfeasors, and Lord Mersey speaks of them as joint tortfeasors, and says they were consequently jointly liable, and Sir Francis Jeune, in *The Frankland* (3), speaks of them as joint tortfeasors. In none of those cases did the question that we have to consider present itself for decision. In each case the judgment would have been precisely the same if the word "joint" had been left out, and the persons involved had been spoken of as "tortfeasors." In my view it would be very dangerous to conclude from any of those three judgments that the judges who gave them were directing their minds to the problem which we have to deal with to-day. These cases do not seem to be of any real assistance to me. I think that the question must always be one dependent upon the particular facts of the case. Where there are two negligent persons causing one damage I think you have to find out—are they participating in one act, or are they taking part in separate acts of negligence combining to produce the same damage? I think we must look at the facts for that. I think the matter may also be fairly tested in the way that Mr. Stephens suggested, by considering what you have to plead. If you would have to make quite separate charges of negligence against the one from those which you would have to make against the other, then

(1) [1912] A. C. 634. (2) [1910] P. 199.
(3) [1901] P. 161.

1923

THE KOURSK.

Hill J.

you have a test as to whether they are both of them taking part in one act or neglect, or whether they are guilty of separate acts of neglect, which combine to effect one damage. Now apply that to the present case. There were two quite separate acts or neglects which by their combined effect caused the *Clan Chisholm* to run into and sink the *Itria*. Those in charge of the *Koursk* were guilty of want of due care towards the *Itria*, because they allowed the *Koursk* to get out of position in the convoy, and did not correct that mistake, and brought the *Koursk* into collision with the *Clan Chisholm*, and thereby contributed one of the causes which drove the *Clan Chisholm* against the *Itria*. Those in charge of the *Clan Chisholm* were in fault, because, being put in a dangerous situation by the *Koursk*, they did not reverse, with the result that they did not prevent the *Clan Chisholm* from being driven against the *Itria*. It was the combined effect of those two separate acts of negligence which, in my view, produced the one damage, and in my view that is not one tort, but is two torts. The principle contended for does not therefore apply to the facts of this particular case.

Now that being so it is unnecessary for me to consider the further point which Mr. Stephens raised—namely, that there is some difference in this matter between the common law rule and the Admiralty rule. It is enough for me to say that, treating the common law rule as applicable to this Court, it is a rule which does not on the facts of this case deprive the plaintiffs of their right of action against the owners of the *Koursk*. I have already pronounced the *Koursk* to blame, and there will be judgment accordingly.

Solicitors for the plaintiffs: *Waltons & Co.*

Solicitors for the defendants: *Wm. A. Crump & Son.*

A. W. G.

ADMIRALTY.

1923
July 12.

H.M.S. GLATTON.

Shipping—Collision—Unlighted Wreck—Admiralty Harbour—Use of Entrance during prohibited Hours—Dockyard Port of Dover—Order in Council of June 10, 1912*—Trespassers—Duty of King's Harbour Master—Status of Royal Yacht Squadron.*

By reg. 9 of the First Schedule of the Dockyard Port of Dover Order in Council of June 10, 1912, all vessels other than His Majesty's ships are forbidden to use the eastern entrance to the Admiralty Harbour between one hour after sunset and one hour before sunrise, without the special authority of the King's Harbour Master. While using the said entrance during the prohibited hours without the authority of the King's Harbour Master the plaintiff's yacht ran upon the wreck of H.M.S. *Glatton*, which was said to have been unlighted at the time:—

Held, that the plaintiff was in effect a trespasser, and that, even assuming the wreck was at the time of the collision unlighted, the defendant, the King's Harbour Master, owed no duty to make the harbour safe for people who were using it at hours when they had no right to use it at all.

Held, further, that the fact that a yacht of the Royal Yacht Squadron is authorized to fly the White Ensign does not confer upon her the status of one of His Majesty's ships within the meaning of reg. 9.

ACTION of damage by collision.

The plaintiff was the owner of the motor yacht *Magdalene*.

The defendant was Commander Thomas Bodley Scott, R.N., King's Harbour Master at Dover.

According to the Statement of Claim, shortly before midnight on June 9, 1922, the *Magdalene*, a schooner-rigged motor yacht of 202 tons (Thames measurement), of the length of 93.1 feet, fitted with a 6-cylinder petrol motor of 140 h.p., was in the eastern entrance to Dover Harbour, intending to come to anchor in the outer harbour. The weather at the time was fine and clear but very dark. The *Magdalene* was making a speed of about five knots and steering a course of about N.E., in order to pass astern of a monitor, which was moored at No. 6 buoy right abreast of the entrance and was swinging with her stern towards No. 12 buoy and heading in a N.W. direction. In these circumstances the *Magdalene*, when just about astern of the monitor, struck an unlighted submerged

1923

H.M.S. GLATTON.

object, which proved to be the wreck of H.M.S. *Glatton*, and sustained damage. The plaintiff complained that the defendant in breach of his duty as harbour master failed to mark and light the said wreck and failed to take reasonable or any steps to secure that the wreck should be and remain lighted, or to warn those on board the *Magdalene* of the position of the wreck.

By his defence the defendant pleaded that he had taken all reasonable care to see that the wreck was properly marked and lighted, and that the collision was due to the negligence of the plaintiff or his servants in (inter alia) improperly using the eastern entrance during prohibited hours.

Stephens K.C. and *Dumas* for the plaintiff.
Dunlop K.C. and *Balloch* for the defendant.

HILL J. When the facts are ascertained with respect to this claim there appears to be no shadow of foundation for it. The claim is brought by the owner of the motor yacht *Magdalene* against Commander Scott, as King's Harbour Master at Dover. The *Magdalene* is a schooner-rigged motor yacht, 93.1 feet long, and about midnight on June 9, 1922, she entered the Admiralty harbour at Dover by the eastern entrance and ran on to the wreck of H.M.S. *Glatton*, which was lying sunk inside the Admiralty harbour at a position which is described in the Channel Pilot Supplement, corrected to February 23, 1922, in this way : " The wreck of the *Glatton*, awash at high water, and marked by a light at night, lies in the Admiralty harbour west-north-westward of the middle of the eastern entrance, at about 350 yards from the south end of the eastern arm." It was also marked in the most conspicuous way upon the current Admiralty charts of Dover Harbour. Upon this wreck the yacht ran and stuck fast, and had to take salvage assistance, and her owner now brings a claim for damages, alleging that the running of the yacht upon the wreck was due to the negligence of the King's Harbour Master in failing to keep the wreck lighted. The evidence of the master of the yacht is that there was no light

1923

H.M.S. GLATTON.

Hill J.

on the wreck; that when he came in by the eastern entrance he manœuvred for a large warship which was swinging at one of the buoys near that entrance, and, while so manœuvring, came upon the wreck as an unlighted object. For the defendant it cannot be absolutely proved one way or the other whether the light was or was not burning. What is proved is that it was an acetylene lamp, which had been used for a long time, and which had hitherto never failed; that it was set for forty-eight hours, and that when left burning it would burn one day longer than the forty-eight hours; that it was lit on June 8 at 3.15 P.M. and was seen to be burning at 10 P.M. on June 9, but was reported to be out at half an hour after midnight on June 10—that was about half an hour after the collision. What is suggested by the defendant is that the shock of the impact was what extinguished the light. However, the master of the yacht says it was not burning, and it was due to that fact that he ran on the wreck. I will assume that the master of the yacht is right, and that by some unexplained chance the light had gone out. Then I have to consider whether there was any negligence on the part of the defendant, and whether there was any negligence on the part of the plaintiff's master of the yacht. The master of the yacht, and his owner (who was on board), were choosing to enter Dover Harbour with no more direction than could be obtained from a very small-scale chart of the eastern half of the English Channel, which really gave no indication, and from the Channel Pilot Supplement. The Supplement, which was corrected up to February, 1922, told them that the wreck was there. I should think it was known to them that it was there, because the *Glatton* became a wreck before the end of the war and therefore had been there for a very long time. I have to ask myself whether the master of the yacht, when he did not see a light where he expected to see a light, was justified in assuming that a light was not there because (as he said he concluded) the wreck had been removed. The Elder Brethren think that he was not justified in drawing that assumption; that there was nothing to warrant him in drawing that assumption;

1923

H.M.S. GLATTON.

Hill J.

and that it was a reckless thing—merely because he did not see the light that he expected to see—to go into that portion of the harbour (in which the Channel Pilot Supplement had told him the wreck was lying) when he had plenty of room in other directions. It is not necessary, however, to decide this matter that I have been dealing with up till now, because it seems to me quite clear that neither the Admiralty nor Commander Scott was under any duty towards the plaintiff of which either was guilty of a breach. This portion of the harbour of Dover is the subject of an Order in Council of June 10, 1912, by which it is provided that: "The Admiralty Harbour shall, subject to the provisions of Clause 4 of this Schedule, be for the exclusive use of his Majesty's ships, and no merchant or other private vessel shall, without permission from the King's Harbour Master, anchor or lie in it." Then Clause 2 provides: "No merchant or other private vessel shall, without licence in writing from the King's Harbour Master, be moored or fastened to any Government moorings, buoys, piles or vessels in the Dockyard Port." And there is a provision in r. 4 that: "As far as practicable a fairway will be kept through the Admiralty harbour for vessels passing between the eastern entrance of the Admiralty harbour and the commercial harbour." That was not the course which the yacht pursued. Then there is a clause—the most important of all—No. 9, which reads as follows: "No vessel other than his Majesty's ships shall use the eastern entrance to the Admiralty harbour between one hour after sunset and one hour before sunrise, without the special authority of the King's Harbour Master." Now the yacht had no authority, special or other, and had obtained no authority at all from the King's Harbour Master to use the eastern entrance, which they did in order to moor at a buoy as they intended to do. As I have said, they were not passing from the eastern entrance to the commercial harbour, nor intending to do so. The position therefore is this: the Admiralty harbour is, as it were, the private property of the Admiralty; it is not open to the public, who have no general right of using it as a harbour. They can only use it in

compliance with the regulations; they can only use it for anchoring or lying in with the permission of the King's Harbour Master; they can only moor at a buoy with the permission of the King's Harbour Master; they must not use the eastern entrance within the prohibited hours without the special authority of the King's Harbour Master; and whatever duty there may be to light a wreck within the harbour, it must be a duty determined with reference to the people who are going to use the Admiralty harbour in a lawful manner of using it. The Admiralty authorities can be under no obligation to light the harbour in such a way that it may be safe to people who are using it at hours when they have no right to use it at all, and when, in substance, they are trespassers upon the harbour. Therefore it seems to me that the plaintiff fails at the very outset of his case, because he does not establish that if the light were out it was out in breach of a duty which the harbour master owed to the plaintiff.

It was suggested that the yacht might be treated as one of His Majesty's ships, within the meaning of these regulations. The suggestion seems to me to be quite absurd, tested in any way you like. Do the sea regulations apply to this yacht? Of course. If the yacht rendered a salvage service could its owner recover salvage? Of course he could. Are those on board the yacht required to show lights? Of course they are. If an action were brought in rem against this yacht, and if it were arrested, could the owner apply to have the yacht released from the arrest of the Court because it was a King's ship? Of course he could not. The idea of this yacht being a King's ship is merely a fantastic one, and appears to be solely derived from the fact that under a warrant of the Admiralty the owner of the *Magdalene*, as a member of the Royal Yacht Squadron, is authorized to fly the White Ensign; but this very authority, by its terms, proves that the ship is not a King's ship, because it recites that the *Magdalene* is a British vessel registered in accordance with the Merchant Shipping Act of 1894, and if she were a King's ship she could not be so registered. The sooner those who

1923

H.M.S. GLATTON.

Hill J.

own yachts—whether members of the Royal Yacht Squadron or not—disabuse themselves of the idea that these craft stand in the position of one of His Majesty's ships the better it will be for them and the better for safe navigation generally.

There will be judgment for the defendant, with costs.

Solicitors for the plaintiff: *Parker, Garrett & Co.*
Solicitor for the defendant: *The Treasury Solicitor.*

A. W. G.

1923

July 9, 16.

ADMIRALTY.

THE SYLVAN ARROW.

Shipping—Collision—Ship under Government Requisition—Officers and Crew Servants of Government—Action in rem for Collision Damage—Whether maritime lien attaches after Ship released from Requisition.

While under requisition by, and manned and operated by, the United States Government, the defendants' steamship was in collision with and did damage to the plaintiffs' steamship. After the vessel had been released from requisition the plaintiffs commenced an action in rem for their collision damage. In that action the defendants pleaded (inter alia) that "at the time when the collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible. . . . . The defendants say that the action is not maintainable in rem by reason of the facts set out" above. On the hearing of this question as a preliminary point of law:—

Held, on the facts, that the defendants had surrendered their vessel to the United States Government under compulsion, that in no sense could it be said that the master and crew derived their authority from the defendants, and that in the circumstances no maritime lien attached to the vessel by reason of the collision and her owners were not, either through their vessel or otherwise, liable to the plaintiffs.

Quaere, as to where an owner voluntarily places his vessel in the possession and control of charterers or other persons, whether *The Lemington* ((1874) 2 Asp. M. L. C. 475) was correctly decided, having regard to the principles laid down in *The Parlement Belge* ((1880) 5 P. D. 197, 218) and other cases.

ACTION OF DAMAGE BY COLLISION.

1923

THE SYLVAN ARROW.

The plaintiffs were the owners of the steamship *W. I. Radcliffe*.

The defendants were the owners of the steamship or vessel *Sylvan Arrow*.

On December 1, 1918, a collision was alleged to have taken place in New York Harbour between the plaintiffs' steamship *W. I. Radcliffe* and the defendants' steamship *Sylvan Arrow*. The *Sylvan Arrow*, a vessel owned by the Standard Transportation Company, an American corporation, was at the time of the alleged collision admittedly manned and operated by officers and men appointed by the United States Navy Department, under a form of requisition charter entered into between the owners and the United States Government, pursuant to an order of requisition dated December 29, 1917. On July 6, 1922, after the *Sylvan Arrow* had been returned to her owners, the owners of the *W. I. Radcliffe* commenced the present action in rem against the *Sylvan Arrow*, and although the two years allowed by the Maritime Conventions Act, 1911, for the commencement of actions had expired, they obtained the leave of the Court to maintain their suit. By their defence to that action the owners of the *Sylvan Arrow* pleaded that they had no knowledge or information of the alleged or any collision between the *Sylvan Arrow* and the *W. I. Radcliffe*; that "(2.) Alternatively if any collision took place between the *W. I. Radcliffe* and *Sylvan Arrow*, which the defendants do not admit, the defendants deny that the collision and damage mentioned in the statement of claim were caused or contributed to by the alleged or any negligence on the part of themselves or their servants. At the time when the said collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible. . . . . (4.) The defendants say that the action

1923

THE SYLVAN ARROW.

is not maintainable in rem by reason of the facts set out in paragraph 2 hereof."

The question of law so raised was argued as a preliminary point.

Raeburn K.C. and *Dumas* for the defendants. All the old cases dealing with this matter are to be found summarized in the judgment of Gorell Barnes J. in *The Ripon City*. (1) In every case where the owner has been found liable for damage done by his ship while she was in the possession and control of other persons it has been because the owner has voluntarily parted with the possession and control of the vessel to those other persons, and those who have been guilty of the negligence must be deemed to have derived their authority from the owner. The owner would be liable even if he had handed over the vessel to charterers under a demise charter, which put it out of his power to choose the master and crew, if he had entered into the charter voluntarily. Here there was not a voluntary surrender but a compulsory taking by the U.S. Government. You cannot imply the owner's authority, and therefore no maritime lien attaches to the vessel and her owner is not liable.

Dunlop K.C. and *Balloch* for the plaintiffs. The documents establish that the notice of requisition was never acted upon and that at the date of the collision the *Sylvan Arrow* was in the possession of the American Government as charterers by demise, under a charterparty dated December 29, 1917, and an agreement made on July 15, 1918. It was from the charterparty and agreement that the American Government derived their authority and not from the order of requisition. There is no evidence that the Government had any power to compel the owners to enter into the said charterparty and agreement, or that the vessel was handed over under any compulsion. Instead of requisitioning the vessel the Government preferred to make a voluntary agreement for hire. It is none the less voluntary because, if the defendants had not agreed, the Government

(1) [1897] P. 226.

had power to take the vessel by a totally different proceeding. There is no suggestion in the defendants' affidavits that they entered into the agreement because they had been served with a requisition order. All they say is that they entered into a requisition charter, and for all the evidence to the contrary that charter may have been entered into at the owners' request. The return of the vessel is not a release from a requisition order but a redelivery from a requisition charter. If the owners have voluntarily given the charterer the option of putting his own crew on board and exercising sole control of the navigation, the crew are deemed to have derived their authority from the owners through the charter, and a maritime lien attaches to the vessel for damage occasioned by the negligence of the crew: see *The Lemington* (1), the judgment in which case was approved by Gorell Barnes J. in *The Ripon City*. (2)

[They also referred to *The Edwin* (3) and *The Tervaete*. (4)]

Raeburn K.C. in reply. The chain of cases which include *The Ticonderoga* (5); *The Lemington* (1); *The Tasmania* (6); and *The Ripon City* (2) would seem to have grown up before it was fully appreciated that the liability of the ship and the liability of the owner must march together: see, moreover, *The Parlement Belge* (7) and *The Utopia*. (8) The compulsion was to give up the possession of the ship under the requisition order. The agreement was merely as to the terms of the requisition.

Cur. adv. vult.

July 16. HILL J. On December 1, 1918, the plaintiffs' steamship, the *W. I. Radcliffe*, and the defendants' steamship, the *Sylvan Arrow*, were in collision in New York Harbour. The *Sylvan Arrow* was then, and still is, owned by the defendants, the Standard Transportation Company, a private corporation, registered under the laws of the State of Delaware. It is admitted, and clearly appears from the affidavits put in,

(1) 2 Asp. M. L. C. 475.
(2) [1897] P. 226.
(3) (1864) Br. & Lush. 281.
(4) [1922] P. 259.
(5) (1857) Swa. 215.
(6) (1888) 13 P. D. 110.
(7) 5 P. D. 197.
(8) [1893] A. C. 492.

1923

THE SYLVAN ARROW.

Hill J.

that at the time of the collision the master and crew of the *Sylvan Arrow* were the servants not of the defendants but of the American Government, appointed, employed, and controlled by the Navy Department. The issue now to be determined is whether, assuming the collision to have been caused by the negligence of those in charge of the *Sylvan Arrow*, any maritime lien attached to the *Sylvan Arrow*, and whether by reason of such lien the defendants can be proceeded against by writ in rem against the ship. The defendants raise this question by para. 2 of the defence: "The *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible." The plaintiffs argued that this did not truly represent the facts and that the facts should be stated thus: "The *Sylvan Arrow* was chartered by the defendants as owners to the Government of the United States under a charterparty operating as a demise and was therefore under the sole control and management of the Government of the United States and was being navigated by persons who were servants of the said Government and for whose negligence the defendants were and are in no wise personally responsible." The plaintiffs contend that upon those facts the ship became subject to a maritime lien, and that an action can be maintained to enforce it. They rely, of course, upon *The Lemington* (1)—a decision of Sir Robert Phillimore in 1874—and the dicta in *The Ticonderoga* (2) (Dr. Lushington, 1857) and *The Tasmania* (3) (Sir James Hannen, 1888) and *The Ripon City* (4) (Gorell Barnes J.). Some day, and probably by a higher Court, *The Lemington* (1) and those dicta and the contrary dictum of Dr. Lushington in *The Druid* (5) will have to be considered in the light of the principles so clearly laid down by the Court of Appeal in *The Parlement*

(1) 2 Asp. M. L. C. 475.
(2) Swa. 215.
(3) 13 P. D. 110.
(4) [1897] P. 226.
(5) (1842) 1 W. Rob. 391.

1923

THE SYLVAN ARROW.

HILL J.

Belge (1) by the House of Lords in *The Castlegate* (2) and by the Privy Council in *The Utopia*. (3) The general principle is thus stated in *The Utopia* (3): "The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of *The Castlegate* (2) . . . . language used by the present Master of the Rolls in *The Parlement Belge* (1) which expresses the above view, was quoted with an approval which their Lordships desire to repeat." What Brett L.J. said was: "Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot." In *The Castlegate* (2) Lord Watson stated the principle of the maritime law to be that "inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship a proper maritime lien must have its root in his personal liability." He then refers to damage actions (*The Lemington* (4) and *The Ticonderoga* (5) had been cited) and says: "It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcilable with the judgment of Dr. Lushington in *The Druid* (6) or with the law laid down by the Court of Appeal in *The Parlement Belge* (7)," and he then quotes Brett L.J. But it may be that for me, *The Lemington* (8), which is a direct decision, is the governing authority. Let us see what the decision in that case and the dicta in the other cases come to. If they are law, they make an exception to the general rule. What precisely is the

(1) 5 P. D. 197, 218.
(2) [1893] A. C. 38, 52.
(3) [1893] A. C. 492, 497, 499.
(4) 2 Asp. M. L. C. 475.
(5) Swa. 215.
(6) (1842) 1 W. Rob. 391.
(7) 5 P. D. 197.
(8) 2 Asp. M. L. C. 475, 478.

1923

THE SYLVAN ARROW.

Hill J.

exception? In *The Ticonderoga* (1) the observations of Dr. Lushington appear to me to be clearly obiter. In that case it does not appear that the master and crew were appointed or paid by the charterers—the French Government—but only that the ship was under the orders of the charterers, "in the service of the French Government." In the course of his judgment he said: "I am not aware, where there has been any proceeding in rem, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this Court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this Court—I will admit, for the purposes of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point—but still I should here say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself." Then he goes on to contrast the case of a pilot by compulsion. The next case is *The Lemington* (2), in which Sir Robert Phillimore said: "I think the law was correctly laid down by Dr. Lushington . . . . in the case of *The Ticonderoga* (3)"; and he went on: "A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as pro hac vice owners. Damage wrongfully done by the res whilst in possession of the charterers is, therefore, damage done by the 'owners' or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled prima facie to a maritime lien upon that ship, and look to

(1) Swa. 215, 217.

(2) 2 Asp. M. L. C. 475, 478.

(3) Swa. 215.

1923

THE SYLVAN ARROW.

Hill J.

the res as security for restitution. I cannot see how the owners of the res can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done, through the negligence of those in charge of her, in whosesoever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorized by her owners. Whether the damage is done through the default of the servants of the actual owners, or of the servants of the chartering owners, the res is equally responsible, provided that the servant making default is not acting unlawfully, or out of the scope of his authority." It will be observed that in both those cases—I am not quite sure that it does not colour much of the earlier judgments in this matter—the ship is spoken of as being "the guilty party." The next case is *The Tasmania* (1), in which Sir James Hannen reviewed the cases; and in *The Ripon City* (2) Gorell Barnes J. expressed the opinion that *The Lemington* (3) was rightly decided. Speaking of *The Parlement Belge* (4), and the dicta I have referred to, he said: "I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the res are personally liable in respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage." A little later, speaking of a maritime lien, he says: "This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." Then he considers the case of a chartered ship: "The principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her who have

(1) 13 P. D. 110.
(2) [1897] P. 226, 242, 244.
(3) 2 Asp. M. L. C. 475, 478.
(4) 5 P. D. 197.

1923

THE SYLVAN ARROW.

HILL J.

allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her. . . . . The persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorised those persons to subject the vessel to those claims."

In these cases it will be seen that the liability of the ship and of the owner through the ship is based upon the fact that the negligent persons "derived their authority from the owner" and that "the owner placed the ship in the possession and control of other persons to be used and employed in the ordinary way"; and that "charterers in whom the control of the ship has been vested by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers who are pro hac vice owners." Let us see whether the United States Navy men in charge of the *Sylvan Arrow* derived their authority from the defendants—whether the defendants

placed the *Sylvan Arrow* in the possession and control of the United States Government—whether the control of the ship was vested by the defendants in the United States Government. According to the affidavit of Mr. Ali sworn on October 12, 1922, para. 3, the *Sylvan Arrow* was requisitioned by the United States Government in December, 1917, and handed over under such requisition to the Navy Department on July 15, 1918, and remained under such requisition until January 21, 1919. To the affidavit of Mr. Morse (sworn on March 2, 1923) are exhibited the requisition charterparty, and it is sworn that from July 15, 1918, to January 21, 1919, the *Sylvan Arrow* was under that portion of the exhibit which is designated the "Bare Boat" form. By an affidavit sworn in this action on July 25, 1922, Mr. D. Radcliffe for the plaintiffs stated that the plaintiffs were advised that the *Sylvan Arrow* had been requisitioned by the United States Government in December, 1917, and in the following July had been taken over by the Navy Department, and was released by the Navy Department early in 1919. It was upon the strength of that affidavit that the plaintiffs obtained leave to maintain the action, notwithstanding that more than two years had elapsed from the date of the collision. The requisition charterparty exhibited is executed by the defendants and by the Director of Operations for the United States Shipping Board. It is headed: "Requisition Charter," and begins: "This Requisition Charter made and concluded upon in the District of Columbia the 29th day of December, 1917." It recites: "Whereas by Requisition Order dated December 29th, 1917, pursuant to the Urgent Deficiency Act of the 15th of June, 1917, and the President's Executive Order of the 11th July, 1917, the United States has requisitioned the use of the steamship *Sylvan Arrow* . . . . and whereas it is desired . . . . to fix the compensation which the United States shall pay to the owner for the use of the steamship so requisitioned and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the Requisition. . . . ." Now therefore it is agreed as follows:

1923

THE SYLVAN ARROW.

HILL J.

"First: The terms and conditions under which the vessel is to be operated shall be those contained in the 'Time Form' hereto annexed; provided, however, that at the time of the requisition or at any time thereafter, on 5 days' written notice, the United States may operate the vessel under the terms and conditions contained in the 'Bare Boat Form' hereto annexed." The Time Form contemplates that the Government has taken possession of the ship and delivers possession back to the owner for the owner to operate the ship for the Government; under it the master and crew are the servants of the owner. The Bare Boat Form contemplates that the ship shall remain in the service of the United States under the requisition order, and provides that the United States shall man and operate the vessel. It is not quite clear, but I was told that in December, 1917, the ship was still in the builders' hands. From correspondence exhibited it appears that by direction of the United States Shipping Control Committee she was handed over to the Navy Department on July 15, 1918, and in the same month notice was given that the Government would operate the vessel under the "Bare Boat" form of charter. The precise status of the Shipping Control Committee does not appear, but if it was not a branch of the United States Shipping Board or of the United States Shipping Board Emergency Fleet Corporation, the correspondence shows that its acts were ratified by the corporation.

From all this I draw the conclusion that the ship was in fact compulsorily surrendered by the owners to the United States Government. I am the more certain of this conclusion because the ship was an oil tanker. In 1917-18 any shipowner who had a tanker free from Government control could have become "rich beyond the dreams of avarice." I see no reason why I should doubt the affidavits or the documents which state that the ship was requisitioned. It is said for the plaintiffs that no requisition order has been produced or disclosed, and it is suggested that in fact there was no order on December 29, 1917. Whether an order was actually made or not, does not seem to me to matter much.

1923

THE SYLVAN ARROW.

Hill J.

If the intention to make an order were intimated to the owner, it would be as effective a compulsion as if it were actually drawn up. The essential fact is that the owner entered into the charterparty because the United States Government had power to compel him to give possession of the ship to the Government. It was also said that the method adopted by the Government was not in strict compliance with the Urgent Deficiency Act, 1917. By s. 1 (*e*) the President is given power (inter alia) to requisition, or take over, the possession of . . . . any ship now constructed or in the process of construction. By s. 2 the President was given power to take immediate possession, if his orders were not obeyed. By s. 3 just compensation was to be paid, to be determined by the President, with a power to sue to persons dissatisfied with the amount. By s. 4 the President may exercise the powers through such agency or agencies as he shall determine. By executive order the President delegated his powers to the United States Shipping Board and the Emergency Fleet Corporation. It is said that because the Government, instead of fixing the just compensation for the *Sylvan Arrow*, proceeded to enter into a charterparty with the owner defining the hire and the other mutual obligations of the Government and the owner, the element of compulsion disappeared and the owner must be treated as one who had voluntarily chartered his ship to the Government. I cannot agree. Underlying the whole transaction was the compulsion—the fact that the Government had and would have exercised the power to take possession of the ship whether the owner consented or not, and also had power to operate the ship by its own servants if it so chose. I am not in the least suggesting that in fact the Government did not proceed in the precise way intended by the Act; but, supposing it did not, the plaintiffs' case is no better, because if it exercised a compulsion illegally it exercised compulsion; if it exercised it legally it exercised compulsion. If it was illegal the position would be analogous to that of a ship which had been seized by pirates, in which case it could not possibly be suggested that the owner of the ship should, in

1923

. THE SYLVAN ARROW.

Hill J.

form of procedure, be responsible for the negligent navigation by the pirates. Such being the position, it cannot in any sense be said that the master and crew of the *Sylvan Arrow*, who were the servants of the United States Navy Department, derived their authority from the defendants, or that the defendants placed the ship in the possession and control of the Navy Department, or that the control of the ship was vested by the defendants in the Navy Department. Accepting the decision in *The Lemington* (1) and the dicta in *The Ticonderoga* (2), *The Tasmania* (3) and *The Ripon City* (4) as sound law, the facts of the present case do not come within them. Upon those facts I hold that no maritime lien attached to the vessel by reason of the collision and that the defendants are not, either through their vessel or otherwise, responsible to the plaintiffs for the collision damage. There will be judgment for the defendants, with costs.

Plaintiffs' solicitors: *Thomas Cooper & Co.*
Defendants' solicitors: *Parker, Garrett & Co.*

(1) 2 Asp. M. L. C. 475.
(2) Swa. 215.
(3) 13 P. D. 110.
(4) [1897] P. 226.

A. W. G.

END OF VOL. AND OF PROBATE SERIES FOR 1923.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1923, will be as follows:—

In the First Series,
[1923] 1 Ch. [1923] 2 Ch.

In the Second Series,
[1923] 1 K. B. [1923] 2 K. B. [1923] P.

In the Third Series,
[1923] A. C.

INDEX.

ABANDONMENT—Claim for salvage by members of crew of abandoned ship - - - - - - **155**
See SHIPPING.

ACT ON PETITION—By husband denying jurisdiction — Security for wife's costs - - - - - - **128**
See DIVORCE.

ACTION IN REM.
See SHIPPING.

ADMIRALTY.
See SHIPPING.

ALIMONY — Amount — Judicial discretion
See DIVORCE. **172**

ANTICIPATION—Restraint on—Petition to vary settlement - - - **1**
See DIVORCE.

"ARMED SHIP"—Lighter carrying troops —Prize bounty - - - - **149**
See PRIZE COURT.

ARTICLES—Form of, in criminal suit by letters of request - - **163**
See DIVORCE.

BANKRUPT—Caveat against probate lodged by - - - - - - **184**
See PROBATE.

BERTH—Damage at—Invitation by wharfingers to discharge in berth belonging to other person- - - **96**
See SHIPPING.

CASES:—
—— *Anghinelli* v. *Anghinelli* [1918] P. 247
Discussed and applied. GRAHAM *v.* GRAHAM - - - - - **31**

CASES—*continued.*
—— *Armytage* v. *Armytage* [1898] P. 178
Discussed and applied. GRAHAM *v.* GRAHAM - - - - - **31**
—— *Bearn* (*The*) [1906] P. 48.
Distinguished. THE EMPRESS **96**
—— *Constantinidi* v. *Constantinidi* [1904] P. 306, 308.
Dicta in discussed and not followed. MORGAN *v.* MORGAN AND KIRBY - **1**
—— *E* 14 (*H.M. Submarine*) [1920] A. C. 403.
Principles stated in applied. *In the Matter of* THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15 **149**
—— *Fitzgerald* v. *Fitzgerald* (1869) L. R. 1 P. & M. 694.
Discussed. PULFORD *v.* PULFORD **18**
—— *Florence* (*The*) (1852) 16 Jur. 572.
Followed. THE PORTREATH - **155**
—— *Lambert* v. *Bassett* (1877) Ir. R. 11 Eq. 291.
Not followed. EMERY *v.* EMERY **184**
—— *Lemington* (*The*) (1874) 2 Asp. M. L. C. 475.
Quaere whether correctly decided. THE SYLVAN ARROW (No. 2) - **220**
—— *Michell* v. *Michell* [1891] P. 208, 210.
Dicta in discussed and not followed. MORGAN *v.* MORGAN AND KIRBY **1**
—— *Moorcock* (*The*) (1889) 14 P. D. 64.
Distinguished. THE EMPRESS **96**
—— *Moran* v. *Place* [1896] P. 214.
Applied. EMERY *v.* EMERY - **184**
—— *Warrior* (*The*) (1862) Lush. 476.
Followed. THE PORTREATH - **155**

CAVEAT—By bankrupt against probate—Security for costs - - 184
See PROBATE.

CHURCH DISCIPLINE ACT, 1840 - 163
See ECCLESIASTICAL LAW.

CHURCH OF ENGLAND ASSEMBLY (POWERS) ACT, 1919 - - 38
See ECCLESIASTICAL LAW.

CITATION—Faculty - - - - 38
See ECCLESIASTICAL LAW.

CITATIONS, STATUTE OF, 1531 - 31
See DIVORCE.

COLLISION.
See SHIPPING.

CONDEMNATION—Motion to set aside decree of—Proceeds transferred to Exchequer—Jurisdiction - - 23
See PRIZE COURT.

COSTS—Divorce—Liability for wife's costs when husband denies jurisdiction
See DIVORCE. 128

—— Security for, against bankrupt who has entered caveat against probate 184
See PROBATE.

CREW—Claim for salvage by crew of salved vessel - - - - - - 155

DECREE ABSOLUTE—Power to vary settlement after remarriage - - 1
See DIVORCE.

DELAY—In applying for prohibition—Faculty - - - - - 38
See ECCLESIASTICAL LAW.

DESERTION—Definition—No existing cohabitation—Intention to desert 18
See DIVORCE.

DISCRETION—To extend time under Maritime Conventions Act—Ignorance of legal rights - - - 85
See SHIPPING.

—— To refuse prohibition—Faculty—Practice - - - - - - 38
See ECCLESIASTICAL LAW.

DIVISION OF LOSS—Tug and tow and third ship—Maritime Conventions Act
See SHIPPING. 76

DIVORCE—*Decree Absolute—Petition to vary Settlement — Respondent and Co-respondent married before Petition presented—Restraint on Anticipation—Power of Court to remove—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5. MORGAN *v.* MORGAN AND KIRBY - - - - **Duke, Pres. 1**

2. —— *Husband and Wife—Judicial Separation—Permanent Alimony—Amount—*

DIVORCE—*continued.*

Practice—Discretion of Judge—Exceptional Cases—Source and Fluctuation of Husband's Income—Acceptance by Wife of low Scale of Maintenance before Desertion—Increase in Husband's Means. DEAN *v.* DEAN
Duke, Pres. 172

3. —— *International Law — Domicil — Nullity—Marriage in Germany—Husband's Domicil English—Wife's German Marriage declared Null by German Court—Validity of German Decree in England.* MITFORD *v.* MITFORD AND VON KUHLMANN
Duke, Pres. 130

4. —— *Judicial Separation—Jurisdiction—Residence—Service—Respondent having a Foreign Domicil and not Resident within the Jurisdiction at the Time of Service and of the Commencement of Proceedings—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 22, 41, 42—*Statute of Citations*, 1531 (23 *Hen.* 8, *c.* 9), *s.* 2. GRAHAM *v.* GRAHAM
Horridge J. 31

5. —— *Maintenance—Order on divorced Husband to secure fixed Sum per Week as permanent Maintenance during Life of Wife—Further Order to pay fixed Sum per Week during joint Lives—Deduction of Income Tax—"Annual payments"—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D—Case III.*, 1 (*a*)—*All Schedules Rules, rr.* 19, 21, 23. SMITH *v.* SMITH - - - - **C. A. 191**

6. —— *Practice—Costs—Act on Petition by Husband denying Jurisdiction—Liability to pay and give Security for Wife's Costs of Act on Petition.* SMITH *v.* SMITH
Hill J. 128

7. —— *Practice—Desertion—Definition—No existing Cohabitation—Conduct of Party charged—Intention to desert—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 4. PULFORD *v.* PULFORD
Duke, Pres. and Hill J. 18

8. ——*Practice—Petition for Damages—Death of Wife before Petition—Claim for Damages a distinct Cause of Action—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 33. KENT *v.* ATKINSON
Hill J. 142

9. —— *Restitution of Conjugal Rights—Wife's Petition—Separation Deed—Bona fides of Applicant—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 17, 22—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5. PALMER *v.* PALMER - - - **C. A. 180**

DOCK—Collision—Ropes obstructing waterway—Duty at tide time - 26
See SHIPPING.

DOCKYARD PORT OF DOVER ORDER IN COUNCIL, 1912 - - - 215

DOMICIL—English — German marriage — Validity of German decree of nullity
See DIVORCE. 130

DOMICIL—*continued.*

—— Foreign — Respondent not resident within jurisdiction—Judicial separation—Service - - - **31**

ECCLESIASTICAL LAW—*Criminal Suit by Letters of Request—Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86), *s.* 13—*Form of Articles—Signature of Counsel—Admissibility of responsive Plea—Motion treated as Hearing of Suit—Disposal of Moneys collected at Offertory, and otherwise—Parochial Church Councils* (*Powers*) *Measure*, 1921 (*No.* 1), *cl.* 4 (1.) (*ii.*) (*a*) *and* 6 (*iv.*). MARSON *v.* UNMACK
Arches Court of Canterbury 163

2. —— *Faculty — Citation — Parochial Church Council—Church of England Assembly* (*Powers*) *Act*, 1919 (9 & 10 *Geo.* 5, *c.* 76), *s.* 4—*Parochial Church Council* (*Powers*) *Measure*, 1921 (*No.* 1), *cl.* 4—*Prohibition — Delay — Discretion — Practice.* PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS-THE-MARTYR *v.* CHANCELLOR OF DIOCESE OF LONDON - - - - - **Div. Ct. 38**

FACULTY — Citation — Parochial Church Council - - - - - - **38**
See ECCLESIASTICAL LAW.

FOG—Vessels leaving dock - - - **162**
See SHIPPING.

HARBOUR—Use of, in prohibited hours—Damage - - - - - **215**
See SHIPPING.

HUSBAND AND WIFE.
See DIVORCE.

IGNORANCE—Of legal rights—Discretion to extend time for bringing action **85**
See SHIPPING.

INCOME TAX—Deduction of—Wife's Maintenance - - - - - **191**
See DIVORCE.

INCOME TAX ACT, 1918 - - - **191**

INTERNATIONAL LAW—Domicil—Nullity
See DIVORCE. **130**

JOINT TORTFEASOR—Unsatisfied judgment against one tortfeasor—Right of recovery against the other—Test of a joint tort - - - - - **206**
See SHIPPING.

JUDICIAL SEPARATION.
See DIVORCE.

JURISDICTION—Judicial separation — Respondent neither domiciled nor resident within jurisdiction - **31**
See DIVORCE.

—— To entertain action in rem for pilotage dues - - - - - - **68**
See SHIPPING.

JURISDICTION—*continued.*

—— To set aside decree in prize—Proceeds transferred to Exchequer - **23**
See PRIZE COURT.

—— To set aside writ on motion—Facts in dispute - - - - - **14**
See SHIPPING.

LETTERS OF REQUEST—Criminal suit by
See ECCLESIASTICAL LAW. **163**

LIEN—Maritime—Pilotage dues - **68**
See SHIPPING.

—— Maritime—Ship released from Government requisition - - - **220**
See SHIPPING.

LIMITATION—Of action—Ignorance of legal rights - - - - - - **85**
See SHIPPING.

—— —— Seizure in prize—Public Authorities Protection Act - - **112**
See PRIZE COURT.

LIVERPOOL PILOTAGE DISTRICT—Rates for "berthing" and "transporting" - - - - - - **80**
See SHIPPING.

MAINTENANCE—Wife's—Deduction of income tax by divorced husband **191**
See DIVORCE.

MARITIME CONVENTIONS ACT, 1911 85
See SHIPPING.

MARITIME LIEN—Attachment after ship released from Government requisition - - - - - - **220**
See SHIPPING.

—— Pilotage dues - - - - - **68**
See SHIPPING.

MATRIMONIAL CAUSES ACTS 1, 31, 142, 180
See DIVORCE.

MEASURES—Church Assembly - **38, 163**
See ECCLESIASTICAL LAW.

MERSEY DOCKS AND HARBOUR BOARD BY-LAWS, 1921—Pilotage rates
See SHIPPING. **80**

MISTAKE—Testator's as to legal effect of words used—Soldier's will - **46**
See PROBATE.

MORTGAGE—Priorities—French mortgagees and English necessaries men - **102**
See SHIPPING.

MOTION—Jurisdiction to set aside writ on motion when facts in dispute **14**
See SHIPPING.

NAVAL PRIZE ACT, 1864 - - - **149**
See PRIZE COURT.

NECESSARIES—Priorities as between English necessaries men and French mortgagees - - - - 102
See SHIPPING.

NULLITY—Validity of German decree of—English domicil - - - 130
See DIVORCE.

OFFERTORY—Disposal of moneys collected at - - - - - - 163
See ECCLESIASTICAL LAW.

PAROCHIAL CHURCH COUNCIL—Application for prohibition by - - 38
See ECCLESIASTICAL LAW.

PAROCHIAL CHURCH COUNCIL (POWERS) MEASURE, 1921 - - 38, 163

PETITION FOR DAMAGES—Death of wife before husband's petition filed 142
See DIVORCE.

PILOTAGE DUES—Right to sue in rem for 68
See SHIPPING.

PILOTAGE RATES—"Berthing"—"Transporting" - - - - - 80
See SHIPPING.

PRACTICE—Admiralty - - - 14
See SHIPPING.

—— Divorce - - - 18, 128, 142
See DIVORCE.

—— Ecclesiastical - - - - - 38
See ECCLESIASTICAL LAW.

—— Probate - - - - - - 184
See PROBATE.

—— Shipping - - - - - - 14
See SHIPPING.

PRIORITIES—English necessaries men and French mortgagees - - 102
See SHIPPING.

PRIZE BOUNTY—"Armed ship"—Lighter carrying troops.
See PRIZE COURT.

PRIZE COURT—*Decree of Condemnation—Proceeds transferred to Exchequer—Motion to set Decree aside—Jurisdiction.* THE HOFSFOS
Duke, Pres. 23

2. —— *Limitation of Action—Seizure and Detention of Ship—Release—Action against Procurator-General for Damages — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1. THE WILHELMINA
Duke, Pres. 112

3. —— *Prize Bounty—"Armed ship" of the Enemy — Lighters carrying Troops — Estimate of Numbers of Persons on Board—Naval Prize Act*, 1864 (27 & 28 *Vict. c.* 25), *s.* 42. *In the Matter of* THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15 (H.M.S. ESPIÈGLE AND OTHER VESSELS)
Duke, Pres. 149

PROBATE — *Practice — Caveat lodged by undischarged Bankrupt — Application by Plaintiffs for Security for Costs—Effect of Caveat. In re* EMERY (DECEASED)
Duke, Pres. 184

2. —— *Will — Probate — Knowledge and Approval—Testator's Mistake as to legal Effect of Words approved—Power of Court to exclude from Probate particular Words—Soldier's Will—Want of testamentary Intention in Document propounded. In the Estate of* ROWLAND JOHN BEECH (DECEASED). BEECH *v.* PUBLIC TRUSTEE
Salter J. and C. A. 46

PROCURATOR-GENERAL—Action against—Public Authorities Protection Act, 1893 - - - - 112
See PRIZE COURT.

PROHIBITION — Application for, by Parochial Church Council - 38
See ECCLESIASTICAL LAW.

PUBLIC AUTHORITIES PROTECTION ACT, 1893 - - - - 112
See PRIZE COURT.

RATES—Pilotage—"Berthing" — "Transporting" - - - - - 80
See SHIPPING.

REQUISITION—Whether maritime lien attaches after release from - 220
See SHIPPING.

RESPONDENT.
See DIVORCE.

RESTITUTION OF CONJUGAL RIGHTS—Separation deed—Bona fides of applicant - - - - - 180
See DIVORCE.

RESTRAINT ON ANTICIPATION—Power of Court to remove - - 1
See DIVORCE.

ROYAL YACHT SQUADRON—Status of yachts flying White Ensign - 215
See SHIPPING.

RULES AND ORDERS—*Dockyard Port of Dover Order in Council, June* 10, 1912: H.M.S. GLATTON - 215

SALVAGE—Claim against ship by members of her crew - - - - 155
See SHIPPING.

SECURITY FOR COSTS—Caveat against probate lodged by undischarged bankrupt - - - - - 184
See PROBATE.

—— Wife's, when husband denies jurisdiction - - - - - - 128
See DIVORCE.

SETTLEMENT—Petition to vary—Restraint on anticipation - - - 1
See DIVORCE.

SHIPPING — *Collision — Innocent Ship damaged by two wrongdoing Vessels—Judgment recovered against one Tortfeasor—Judgment unsatisfied—Right of subsequent Recovery against other Tortfeasor—Test of a joint Tort.* THE KOURSK - **Hill J. 206**

2. —— *Collision—Loss of Life—Limitation of Action—Ignorance of legal Rights—Discretion to extend Time—Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8. THE KASHMIR - - **Hill J. and C. A. 85**

3. —— *Collision—Practice—Maritime Lien—Action in rem—Motion to set aside Writ—Facts in dispute — Jurisdiction.* THE SYLVAN ARROW - - - - **Hill J. 14**

4. —— *Collision—Ship under Government Requisition—Officers and Crew Servants of Government — Action in rem for Collision Damage—Whether Maritime Lien attaches after Ship released from Requisition.* THE SYLVAN ARROW (No. 2) - - **Hill J. 220**

5. —— *Collision—Tug and Tow and third Ship—All three Ships to blame—Division of Loss—Tug under Orders of Tow—Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1. THE SOCRATES AND THE CHAMPION **Hill J. 76; reversed C. A. 162**

6. —— *Collision — Unlighted Wreck — Admiralty Harbour—Use of Entrance during prohibited Hours—Dockyard Port of Dover—Order in Council of June* 10, 1912—*Trespassers—Duty of King's Harbour Master—Status of Royal Yacht Squadron.* H.M.S. GLATTON - - - - - - **Hill J. 215**

7. —— *Collision in Dock—Vessel moored with Ropes obstructing Waterway—Duty at Tide Time.* THE THEODOROS; THE BLIDENSOL - - - - - - **Hill J. 26**

8. —— *Damage at Berth—Invitation by Defendant Wharfingers to discharge in Berth belonging to other Persons—Berth Defective—Absence of Knowledge on Part of Defendants—No Duty owing by Defendants to Shipowners.* THE EMPRESS - - **Hill J. 96**

9. —— *Pilotage—Rates for the Liverpool Pilotage District — "Berthing" — "Transporting"—"Waiting for tide"—Mersey Docks and Harbour Board's Byelaws*, 1921. THE CYCLOPS - - - - - - **Hill J. 80**

10. —— *Pilotage Dues—Action in rem—Maritime Lien—Jurisdiction—Summary Procedure—Pilotage Act*, 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 49. THE AMBATIELOS; THE CEPHALONIA - - - - - **Hill J. 68**

11. —— *Priorities—French Ship arrested in England—Necessaries Men—Claimants under a French Mortgage—Lex Loci—Lex Fori.* THE COLORADO - **C. A. 102**

12. —— *Salvage—Abandonment—Call for Volunteers to return to Ship—Claim for Salvage by Members of Crew—Contract of Service—Duty of Crew.* THE PORTREATH **Hill J. 155**

STATUTES:—

1531.

23 Hen. 8, c. 9 (Statute of Citations), s. 2: GRAHAM *v.* GRAHAM - - **31**

1840.

3 & 4 Vict. c. 86 (Church Discipline), s. 13: MARSON *v.* UNMACK - **163**

1857.

20 & 21 Vict. c. 85 (Matrimonial Causes), ss. 17, 22: PALMER *v.* PALMER **180**

—— —— ss. 22, 41, 42: GRAHAM *v.* GRAHAM - - - - **31**

—— —— s. 33: KENT *v.* ATKINSON **142**

1859.

22 & 23 Vict. c. 61 (Matrimonial Causes), s. 5: MORGAN *v.* MORGAN AND KIRBY - - - - - **1**

1864.

27 & 28 Vict. c. 25 (Naval Prize), s. 42: *In the Matter of* THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15 - - - - **149**

1884.

47 & 48 Vict. c. 68 (Matrimonial Causes), s. 5: PALMER *v.* PALMER - **180**

1893.

56 & 57 Vict. c. 61 (Public Authorities), s. 1: THE WILHELMINA - **9**

1895.

58 & 59 Vict. c. 39 (Summary Jurisdiction (Married Women)), s. 4: PULFORD *v.* PULFORD - - **18**

1911.

1 & 2 Geo. 5, c. 57 (Maritime Conventions), s. 1: THE SOCRATES AND THE CHAMPION - - - **76**

— - —— s. 8: THE KASHMIR - [**85**

1913.

2 & 3 Geo. 5, c. 31 (Pilotage), s. 49: THE AMBATIELOS; THE CEPHALONIA **68**

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), Sch. D, Case III., 1 (*a*): SMITH *v.* SMITH **191**

1919.

9 & 10 Geo. 5, c. 76 (Church of England Assembly (Powers)), s. 4: PAROCHIAL CHURCH COUNCIL OF ST. MAGNUS-THE-MARTYR *v.* CHANCELLOR OF DIOCESE OF LONDON - **38**

SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895 - - **18**
See DIVORCE.

TAX—Income—Deduction of—Wife's maintenance - - - - - - **191**
See DIVORCE.

TESTAMENTARY INTENTION—Power of Court to exclude particular words from probate - - - **46**
See PROBATE.

TIDE TIME—Duty of vessels moored in dock - - - - - - 26
See SHIPPING.

TORTFEASOR—Test of a joint tort - 206
See SHIPPING.

TUG AND TOW—Tug under orders of tow —Liability to third ship—Division of loss - - - - - 76, 162
See SHIPPING.

UNLIGHTED WRECK—Use of harbour during prohibited hours - 215
See SHIPPING.

"WAITING FOR TIDE" - - - 80
See SHIPPING.

WHARFINGERS—Invitation to discharge in berth belonging to other persons
See SHIPPING. 96

WILL—Soldier's - - - - - - 46
See PROBATE.

WORDS:—
—— "Armed Ship": *In the Matter of* THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15- - - 149
—— "Berthing": THE CYCLOPS - 80
—— "Transporting": THE CYCLOPS - 80
—— "Waiting for tide": THE CYCLOPS 80

WRECK—Unlighted obstruction—Use of harbour during prohibited hours
See SHIPPING. 215

WRIT—Motion to set aside when facts in dispute - - - - - - 14
See SHIPPING.

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PART I.—JANUARY 3.

TABLE OF CASES.

KING'S BENCH DIVISION.

	PAGE		PAGE
EVERETT *v.* ISLINGTON GUARDIANS ..	44	REX *v.* GODFREY	24
JONES *v.* EVANS .. .. .. (C.A.)	12	TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE *v.* SHIPTON & SONS ..	31
PARR *v.* SNELL .. .. .. (C.A.)	1		

PROBATE DIVISION.

	PAGE
MORGAN *v.* MORGAN	1

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

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